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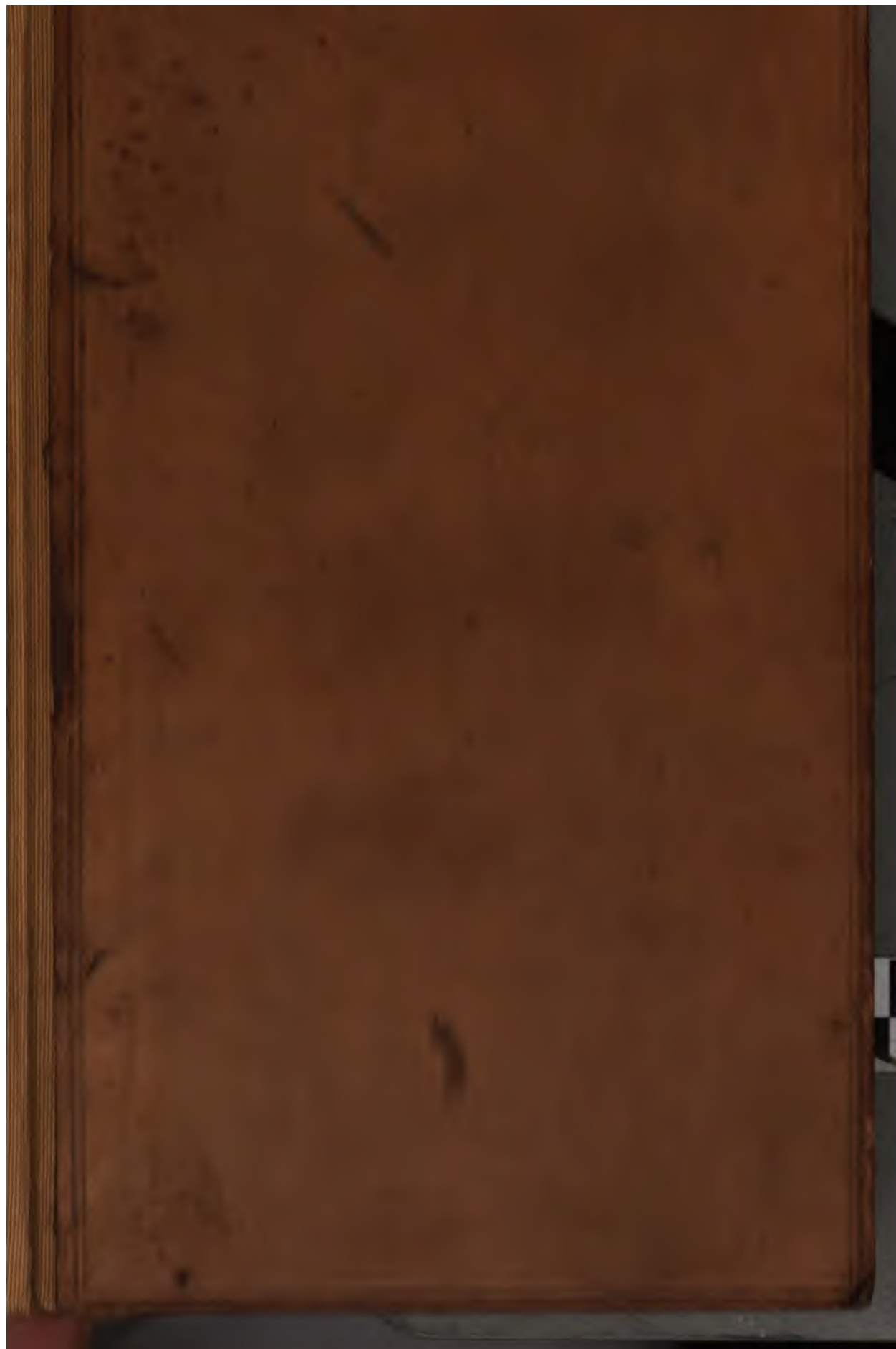
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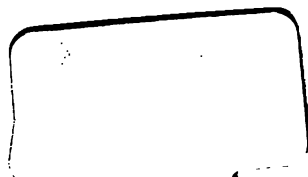
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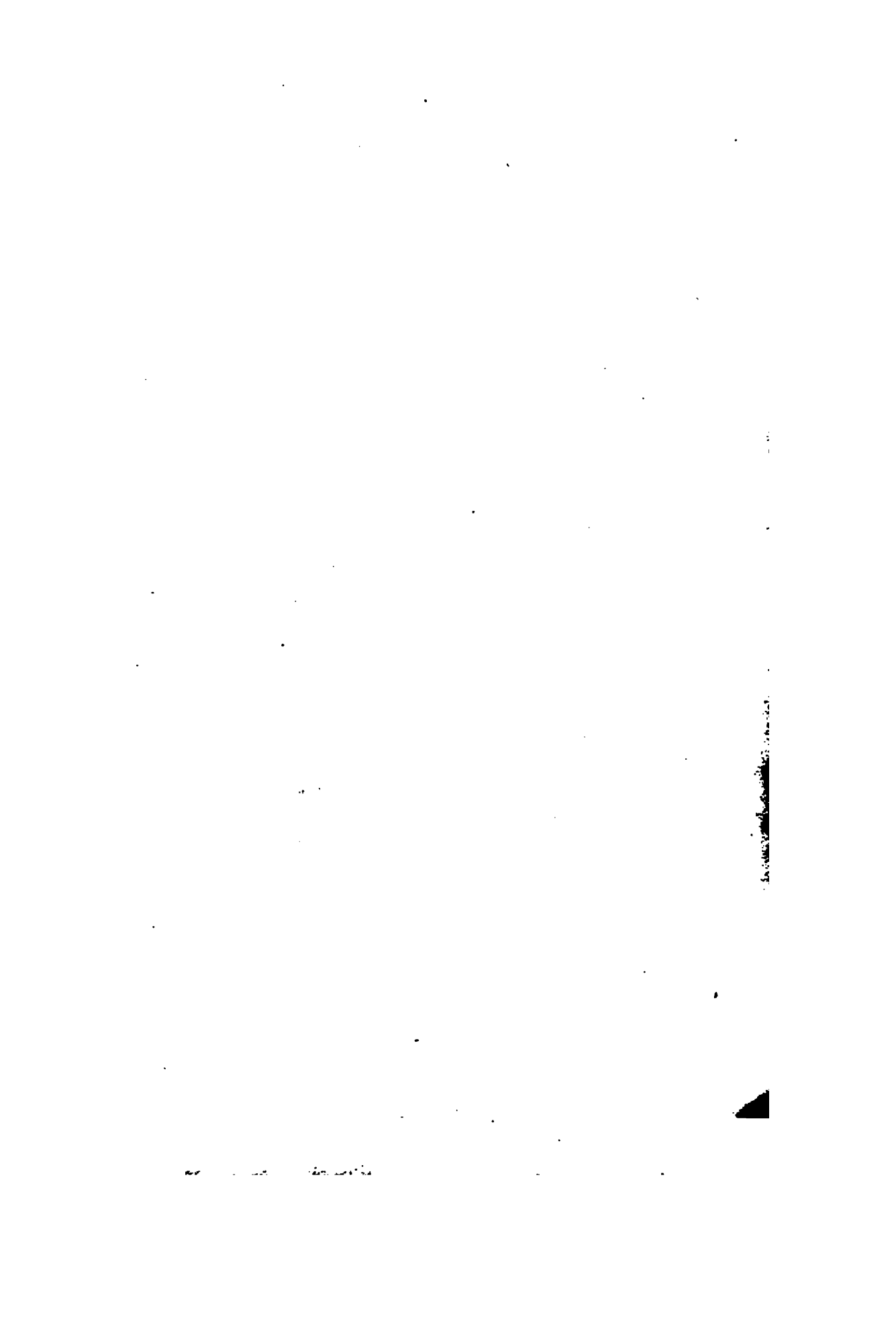
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NEW
REPORTS
OF
Cases
HEARD IN
THE HOUSE OF LORDS,
ON
APPEALS AND WRITS OF ERROR;
AND DECIDED
DURING THE SESSION
1830.

By RICHARD BLIGH, Esq.
BARRISTER AT LAW.

VOL. IV.

LONDON:
HENRY BUTTERWORTH,
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7. FLEET STREET.

1833.

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REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS,

UPON APPEALS AND WRITS OF ERROR,

And decided during the Session 1830,

11th GEO. IV. and 1st WM. IV.

ENGLAND.

(COMMON PLEAS AND KING'S BENCH.*)

JOHN HENRY ROAKE, THOMAS WIL- }
LIAM ROAKE, and GEORGE ROAKE } *Plaintiffs.*

JOHN DENN, on the several Demises }
of Richard Nowell, Gent. and } *Defendant.*
William Atkinson - - - - }

S. S. was seised of lands in the county of Surrey, as to one moiety in fee by descent. The other moiety was limited to her for her life, with a power to appoint an estate in fee by deed or will, with remainders over in default of appointment. S. S. by her will devised all her freehold estates in the county of Surrey to J. R. for life, on the condition, that out of the rents he should keep them in repair. At his death the lands chargeable with an annuity were by this will devised to the children of J. R. with remainders over. S. S. died, leaving J. R. surviving; and she, at the respective times of making

* The Reports of the case in the Courts above are to be found in 2 Bingham, 497, *Doc v. Roake*; and 5 Barn. and Cres. 720, *Denn v. Roake*.

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her will and her death, had no other lands in Surrey but those before stated. Upon the argument of a special verdict, stating these facts, held in the Court of Common Pleas, that this was a valid execution of the power: but this judgment was reversed in the Court of King's Bench; and the judgment of the King's Bench was affirmed on a writ of error.

IN Trinity Term, 57th George III. the Defendant in Error brought an action of ejectment in the Court of Common Pleas, for the recovery by the first count of the entirety, and by the second count of a moiety, of two water corn mills, two mills, two kilns, and a messuage, cottage, dwelling-house, and premises, with the appurtenances, and divers acres of arable land, meadow land, dasture land, land covered with water, and marsh land, in the parish of Godalming, and county of Surrey. The lessors of the Defendant in Error became entitled to the moiety in question under conveyances by lease and release, bearing date respectively the 20th and 21st of May, 1802, thereof made by John Roake, since deceased, the father of the Plaintiffs in Error.

The demises in ejectment were laid on the 2d day of July, in the year 1811.

The Plaintiffs in Error pleaded the general issue of not guilty, and issue was joined on that plea.

The cause was tried at the Surrey Spring Assizes, 1823, before the then Chief Baron, when a special verdict was found, stating the title in substance as follows:—

Miles Poole was seised in his demesne as of fee of the premises mentioned in the declaration, and being so seised, died on the 17th of Novem-

ber, 1749 ; after his death the premises descended to Sarah, the wife of Thomas Scott, and Elizabeth, the wife of Henry Roake, which Sarah and Elizabeth were the daughters and coheirs of Miles Poole, and Thomas Scott and Sarah his wife, in right of Sarah, and Henry Roake and Elizabeth his wife, in right of Elizabeth, entered into and were seised of the premises as the law requires ; and by indentures of lease and release, bearing date respectively the 25th and 26th of April, 1750, (and duly executed,) between Thomas Scott and Sarah his wife and Henry Roake and Elizabeth his wife of the first part, George Johnson of the second part, and William Hill of the third part, the premises were conveyed to William Hill, to the intent and purpose that William Hill should become tenant of the freehold of the premises, until a common recovery should be thereof obtained against him by George Johnson as demandant ; and it was by the indenture of release declared, that the recovery should be and enure to the uses, intents, and purposes following ; that is to say, as to, for, and concerning one full and equal undivided moiety and half part of the tenements, with the appurtenances, to the use of Thomas Scott and his assigns for his natural life ; remainder to the use of Sarah Scott, his wife, for life ; remainder to the use of such person and persons, and for such estate and estates, as Sarah Scott, whether covert or sole, should by any deed or writing under her hand and seal, to be sealed and executed in the presence of three or more credible witnesses, with or without power of revocation, or by her last will and testament in writing, or any writing pur-

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porting to be her last will and testament, to be by her subscribed and published in the presence of three or more credible witnesses, from time to time direct, limit, or appoint; and for want of such direction, limitation, or appointment, to the use of all and every the child and children of Thomas Scott, on the body of Sarah Scott begotten, or to be begotten, equally to be divided between them share and share alike, to take as tenants in common, and not as joint tenants, and of the several and respective heirs of the body and bodies of such child and children lawfully issuing; and failing issue of any such child and children, to the use of all and every other such child and children equally, share and share alike, to take as tenants in common, and the heirs of their respective bodies lawfully issuing; and if one child only, to the use of such only child and the heirs of his or her body; and for default of such issue, to the use of the said Elizabeth Roake and her assigns, for and during her natural life, without impeachment of waste; remainder to the use of all and every the child and children of the said Elizabeth Roake, equally to be divided between them share and share alike, to take as tenants in common and not as joint tenants, and of the several and respective heirs of the body and bodies of such child and children lawfully issuing; and failing issue of any such child or children, to the use of all and every other such child and children equally, share and share alike, to take as tenants in common, and the heirs of their respective bodies lawfully issuing; and if one child, to the use of such only child, and the heirs of his or her body; and in default of

such issue, to the use of the said Thomas Scott, his heirs and assigns, for ever; and the moiety of which Henry Roake and Elizabeth his wife were seised in her right, was settled to other uses.

A recovery was suffered in Easter Term, 1750, and by virtue of the conveyance and recovery Thomas Scott and Sarah his wife, and Henry Roake and Elizabeth his wife, entered into the premises as to their respective moieties, and became and were seised of such estates and interests therein as could lawfully pass to them under and by virtue of the indentures and recovery; and Thomas Scott afterwards, in or about the year 1758, died without having had any issue by Sarah his wife, leaving his wife Sarah him surviving. Sarah Scott afterwards intermarried with one John Trymmer, in 1763, and he died in or about the month of June 1766, leaving his wife the said Sarah him surviving. Elizabeth Roake died in May 1755, leaving Henry Roake her husband, and John Roake her son and only child by Henry Roake, her surviving, and without having made any appointment; and under the uses declared of the second mentioned moiety, Henry Roake became tenant for life of that last mentioned moiety, with remainder to John Roake his only child in tail.

By indentures of lease and release, bearing date respectively the 6th and 7th days of September, 1775, and duly executed and made between Henry Roake and John Roake, (the son and only child of Henry Roake by Elizabeth his late wife, then deceased,) Sarah Trymmer, Benjamin Parnell, and James Morgan, (the indenture

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of release reciting that Sarah Trymmer had contracted and agreed with John Roake for the absolute purchase of his moiety, subject to the life estate of Henry Roake therein,) Henry Roake and John Roake conveyed the other moiety of the premises in the declaration mentioned to Benjamin Parnell in fee, to the intent and purpose that he might become a tenant of the freehold for suffering a recovery ; and it was declared that the recovery should be and enure to the use and behoof of Henry Roake and his assigns for the term of his natural life, remainder to Sarah Trymmer in fee.

Henry Roake died on the 15th of December, 1777. And on the 6th of June 1783, Sarah Trymmer made and published her last will and testament in writing, in the presence of and attested by three credible witnesses, and thereby gave and devised all her freehold estates in the city of London and county of Surrey, or elsewhere, in the words following; that is to say,
 “ I hereby give and devise all my freehold estates
 “ in the city of London and county of Surrey, or
 “ elsewhere, to my nephew John Roake for his
 “ life, on condition, that out of the rents thereof
 “ he do from time to time keep such estates in
 “ proper and tenantable repair; and on the de-
 “ cease of my said nephew John Roake I devise
 “ all my said estates, subject to and chargeable
 “ with the payment of £30. a year to Anne, the
 “ wife of the said John Roake, for her life, by
 “ even quarterly payments, to and among his
 “ children lawfully begotten, equally, at the age
 “ of twenty-one, and their heirs, as tenants in
 “ common : but if only one child should live to

"attain such age, to him or her, or his or her
"heirs, at his or her age of twenty-one; and in
"case my said nephew John Roake should die
"without lawful issue, or such lawful issue should
"die before twenty-one, then I devise all the
"said estates, chargeable with such annuity of
"30*l.* a year to the said Anne Roake for her life
"in manner aforesaid, to and among my nephews
"and nieces Miles, Thomas, John, James, and
"Sarah Pinfold, and Susannah Longman, or such
"of them as shall be then living, and their heirs
"and assigns for ever."

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Sarah Trymmer died on the 4th of December 1786, without revoking her will; John Roake being then living, and her heir at law.

Sarah Trymmer had not at the time of making her will, or at the time of her death, any freehold lands, tenements, or hereditaments in the county of Surrey, other than those mentioned in the declaration.

By indenture quadripartite of the 26th of April 1787, and duly executed between John Roake, the nephew and heir at law, and also the devisee for life named in the will of Sarah Trymmer of the first part; and Miles, Thomas, John, James, and Sarah Pinfold, and Susannah Longman, the nephews, and nieces, and devisees named in the will of Sarah Trymmer, of the second part; Benjamin Parnell of the third part; and Thomas Holland, Gent. of the fourth part; after reciting, among other things, the death and will of Sarah Trymmer, and that the recovery intended to have been suffered, pursuant to the agreement contained in the indenture of the 7th of September 1775, had never been suffered, nor any other re-

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covery of the moiety, being the moiety formerly of the said Elizabeth Roake, it was declared and agreed upon by and between all and every the parties to that indenture, that a recovery should be suffered to enure to the same uses as those mentioned in Sarah Trymmer's will, or such of them as were capable of taking effect. A recovery of the moiety was accordingly suffered in Easter Term, 27th George III.

By indenture, bearing date the 5th of November 1789, and duly executed, between John Roake of the one part, and Richard Nowell of the other part, John Roake covenanted with Richard Nowell to levy a fine of the premises in the declaration mentioned, to the use of John Roake in fee.

In pursuance of that agreement a fine was levied in the Michaelmas Term then next ensuing.

By indentures of lease and release, bearing date respectively the 3d and 4th of July 1797, and duly executed, between John Roake and Elizabeth his wife of the first part, the said Richard Nowell of the second part, and John Radcliffe of the third part, the premises in the declaration mentioned were conveyed by John Roake to Richard Nowell in fee, for the purpose of making him a tenant to the præcipe, in order that he might suffer a recovery, to the use of such person or persons as John Roake should appoint; and in default of such appointment, to the use of John Roake in fee; and in pursuance of that agreement a recovery was suffered in Trinity Term 37th George III.

By indentures of lease and release, bearing date respectively the 20th and 21st May, 1802,

between John Roake of the first part, Richard Nowell of the second part, John Atkinson of the third part, William Smith of the fourth part, and William Atkinson of the fifth part, John Roake, in consideration of 1220*l.* purchase money, conveyed the premises to John Atkinson in fee, to such uses as the said Richard Nowell should appoint; and in default of such appointment to the use of Richard Nowell for life, without impeachment of waste; and after the determination of that estate by any means in the life time of Richard Nowell, to the use of John Atkinson during the life of Richard Nowell as trustee to bar dower; remainder to the heirs of Richard Nowell in fee.

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By virtue of the last mentioned conveyance, Richard Nowell entered, and became and was seised of such estate of and in the said tenements as could or might lawfully pass to him under and by virtue of that indenture.

John Roake died the 13th of February 1803, and left the Defendants (the Plaintiffs in Error) John Henry Roake, Thomas William Roake, Elizabeth Roake, and George Roake, who were his only children, him surviving.

The special verdict concluded by stating, that Richard Nowell being so seised and possessed as aforesaid, on the 2d of July 1811, demised the premises to John Denn and his assigns, from the first day of the same month to the full end and term of twenty-one years then next ensuing, and fully to be complete and ended: by virtue of which demise John Denn entered into and was possessed of the premises, until the Defendants (the Plaintiffs in Error) and Elizabeth Roake, on

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the 2d day of July 1811, claiming title to the premises, entered and expelled John Denn, and have kept him from the possession of the same from thence hitherto.

On this special verdict, judgment was pronounced by the Court of Common Pleas, on the 7th of February, in Hilary Term 1825, for the Plaintiffs in Error.

On the 10th of the same month the Defendant in Error sued out his Writ of Error in the Court of King's Bench.

In Michaelmas Term in the same year errors were assigned by the Plaintiff, and afterwards in the same term the Defendants delivered their Joinder in Error.

In Trinity Term 1826, judgment was given by the Court of King's Bench for the Defendant in Error, reversing the judgment of the Court of Common Pleas.

After judgment pronounced by the Court of King's Bench on the Writ of Error, the Plaintiffs in Error moved that Court to quash the Writ of Error on the technical point stated below. But the Court refused to interfere, on the ground that the Plaintiffs in Error had joined in the proceedings in Error, and the merits of the case had been fully argued and decided.

The Plaintiffs in Error then moved the Court of Common Pleas to issue execution on the judgment they had obtained in that Court; but the Court of Common Pleas refused the application.

They then sued out a Writ of Error in Parliament, and assigned general errors, and also "that
" it appears that the Writ of our Lord the King
" for amending and correcting the said supposed

“ error in the record and process in the plaint
 “ which was in the Court of our said Lord the
 “ King before the Justices of the Bench at West-
 “ minster, and on which said Writ the reversal
 “ of the judgment of that Court is founded, was
 “ returnable in the said Court of our said Lord
 “ the King before the King himself, in fifteen
 “ days of Easter, in the sixth year of the reign of
 “ our said Lord the King; whereas the said judg-
 “ ment of the said Court of our said Lord the
 “ King before the Justices of the Bench at West-
 “ minster, was not given or pronounced until after
 “ the return of the said writ for correcting Errors,
 “ that judgment not having been given or pro-
 “ nounced until Trinity Term, in the sixth year
 “ aforesaid;” and also that “ there is not any
 “ writ or process remaining of record in the said
 “ Court of our said Lord the King before the King
 “ himself, to warrant or authorise the judgment
 “ of reversal given, and pronounced by that
 “ Court.”

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The Defendant in Error pleaded in *Nullo est Erratum*.

On the part of the Plaintiffs in Error it was argued first, as to matter of form, that there was such a defect in the writ of error in the King's Bench, as was not amendable or curable under the Statute 5 Geo. I. c. 13, and the writ of error ought to have been quashed; and the following authorities were cited:—*Wright v. Canning*, 2 Strange, 807; *Canning v. Wright*, 2 Lord Raymond, 1531, S. C.; *Vice v. Burton*, 2 Strange, 891, S. P.; and in addition to those cases, *Rejeindox v. Randolph*, 2 Strange, 834; and *Wilson v.*

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Ingoldsby, 2 Lord Raymond, 1179; *Somerville v. White*, 5 East, 145; *Gravall v. Stimpson*, 1 B. and P. 479.

Secondly, on the merits: that the will of Sarah Trymmer was a good execution of her power.* For at the time of making her will, she had no freehold estates in the county of Surrey, except the undivided moiety of the tenement in the county of Surrey, which was subject to her power of appointment. Consequently her will would have been totally inoperative at law as to any tenements in the county of Surrey, unless it were allowed to operate as an execution of the power. The Courts below reasoned upon the assumption that Sarah Trymmer was seised in fee of one undivided moiety of the tenements in the county of Surrey, and was seised of the other moiety for life, with a power of appointment; whereas it is apparent, upon the face of the special verdict, that she was not seised in fee of one moiety, inasmuch as the recovery intended to be suffered in pursuance of the deeds of September, 1775, was not suffered till after her death, consequently the legal estate conveyed by those deeds remained vested in Parnell, and never did vest in Sarah Trymmer.

On the part of the Defendants in Error as to the question of form, it was argued that the Plaintiffs in Error having joined issue on the Writ of Error, were estopped and precluded from objecting to the irregularity, if any, in the proceedings. To have availed themselves of the insufficiency of the Writ of Error, they ought to

* *Standen v. Standen*, 2 Ves. jun. 589.

have put a Plea on the Record applicable to the case.

As to the merits, it was argued that Mrs. Trymmer did not express any intention to exercise her power: and that it is a rule of law that general words shall not amount to an exercise of a power of appointment, unless the language of the instrument has reference to the power, or the subject, or would, in the genuine and legal import of the language, fail of effect unless it amounted by construction to an execution of the power.

In this case no reference is made in the will of Mrs. Trymmer to the power, or the subject, and the language of her will has full operation by its application to property of which Mrs. Trymmer was seised in fee.

The following authorities were cited:—Pro: Sir Ed. Clare's Case, 6 Rep. 17; *Maddison v. Andrew*, 1 Ves. 57; *Morgan v. Surman*, 1 Tau. 289; *Roach v. Wadham*, 6 East, 289; *Dillon v. Dillon*, 1 Ball and Be. 77; *Hales v. Margerum*, 3 Ves. 299. —Con: *Andrews v. Emmott*, 2 B. C. C. 297; *Langham v. Nenny*, 3 Ves. 467; *exparte Caswall*, 1 Atk. 559; *Nannock v. Horton*, 7 Ves. 391; *Bennet v. Aburrow*, 8 Ves. 609; *Bradley v. Westcott*, 13 Ves. 445; *Jones v. Tucker*, 2 Mer. 533; *Jones v. Currie*, 1 Swan, 66.

For the Plaintiffs in Error.—*The Attorney General* and Serjeant Peake.*

For the Defendants in Error.—*The Solicitor-General and Mr. Preston.*

* Tindal, shortly afterwards appointed Chief Justice of the Common Pleas.

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The case was argued before the Judges in 1829, and after the argument a question was put to the Judges, which, on the 16th of February, 1830, was answered by the Lord Chief Baron, who delivered the opinion of the Judges as follows:—

The Lord Chief Baron.—There is no difference of opinion among the judges. The question which they have had to consider, in pursuance of your Lordships' order, is expressed in these words:—Whether, upon the facts stated in the special verdict in this case, the will of Sarah Trymmer operated as an execution of the power of appointment of that moiety of the tenements in Surrey, of which she was tenant for life, with the power of appointment stated in the special verdict.

The facts stated in the special verdict, which it is material to recollect, are these:—In the year 1749, estates, one moiety of which is now in question, upon the death of their father, Miles Poole, descended upon Sarah, the wife of Thomas Scott, and Elizabeth, the wife of Henry Roake, who were his daughters and co-heirs. In 1750, these estates were validly settled to the following uses:—One full undivided moiety to the use of Thomas Scott, for life; remainder to the use of Sarah Scott, his wife, for life; remainder to the use of such person or persons, and for such estate and estates, as the said Sarah Scott, whether covert or sole, should by any deed or writing under her hand and seal, to be sealed and executed in the presence of three or more credible witnesses, with or without power of revocation, or by her last will and testament in writing, or any writing purporting to be her last will and testament, to be by her subscribed and published, in the presence

of three or more credible witnesses, from time to time direct, limit, or appoint; and for want of appointment, to the use of the children of that marriage; and in default of issue, this moiety was limited to Elizabeth Roake, for her life, with limitations to her family, analogous to those which I have mentioned respecting Sarah Scott and her family. The other undivided moiety was limited for the use of Elizabeth Roake for life, subject to limitations exactly of the same nature and description with those I have already mentioned as to the preceding moiety. It is unnecessary to detail them. Sarah Scott survived her first husband, Thomas Scott, and afterwards intermarried with one John Trymmer, whom she also survived. She became a widow the second time, in 1766. In 1775 she purchased the other undivided moiety from the family of Roake. By deeds dated in that year, that moiety was conveyed to make a tenant to the præcipe, in order to the suffering of a common recovery; which recovery it was declared should enure to the use of Henry Roake for life, with remainder to Sarah Trymmer, the widow in fee. Henry Roake died in December 1777, and by his death Sarah Trymmer came into the possession of that undivided moiety.

From this time, therefore, to the time of her death, she had the absolute and entire interest in that undivided moiety of the estate which had been originally, by the deeds of 1750, limited to the family of Roake; and as to her own moiety, her first husband, Thomas Scott, being dead, she was tenant for life of it, with the power of appointment or authority before particularly stated; and in default of appointment, the estates stood

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limited to the several uses I have also before stated.

Such were the rights, interests and authorities which were vested in Sarah Trymmer, when she made the will to which the question put by your Lordships refer. That will is dated on the 6th of June, 1783, has all the solemnities required by the deed of 1750, creating the power, and is, so far as respects this subject, in the following words:—" I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew, John Roake, for his life, on condition, that out of the rents thereof he do, from time to time, keep such estates in proper and tenantable repair; and on the decease of my said nephew, John Roake, I devise all my estates, subject to and chargeable with the payment of 30*l.* a year to Anne, the wife of the said John Roake, for her life, by even quarterly payments, to and among his children lawfully begotten, equally, at the age of twenty-one, and their heirs, as tenants in common: but if only one child should live to attain such age, to him or her, or his or her heirs, at his or her age of twenty-one: And in case my said nephew, John Roake, should die without issue, or such lawful issue should die before twenty-one, then I devise all the said estates, chargeable with such annuity of 30*l.* a year, to the said Anne Roake, for her life, in manner aforesaid, to and among my nephews and nieces, Miles, Thomas, John, James, and Sarah Pinfold, and Susannah Longman, or such of them as shall be then living, and their heirs "and assigns for ever."

We are of opinion that this devise is not an execution of the authority given to Sarah Trymmer, by the settlement of 1750. There are many cases upon this subject, and there is hardly any subject upon which the principles appear to have been stated with more uniformity, or acted upon with more constancy. They begin with Sir Edward Clere's case*, in the reign of Queen Elizabeth, and are continued down to the present time; and I may venture to say, that in no instance has a power or authority been considered as executed, unless by some reference to the power or authority, or to the property, which was the subject of it; or unless the provision made by the person intrusted with the power would have been ineffectual, would have had nothing to operate upon, except it were considered as an execution of such power or authority.

In this case there is no reference to the power, there is no reference to the subject of the power, and there is sufficient estate to answer the devise without calling in the aid of the undivided moiety now in question: all the words are satisfied by the undivided moiety of which she was the owner in fee. It is said that the present is a question of intention, and so, perhaps, it is; but there are many cases of intention, where the rules by which the intention is to be ascertained are final and settled. It would be extremely dangerous to depart from these rules in favor of loose speculation, respecting intention in the particular cases. It is, therefore, that the wisest Judges have thought proper to adhere to the rules I have

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* 6th Report, fo. 17.

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mentioned, in opposition to what they evidently thought the probable intention in the particular case before them. I will refer to one only—to *Jones v. Tucker*,* before Sir William Grant. In that case, a person had power to appoint 100*l.*; by her will she bequeathed 100*l.* to the Plaintiff, and, it was said, had nothing but a few articles of furniture of her own to answer the bequest.

The language which, according to the reporter, Sir William Grant used was this:—"In my own private opinion, I think the intention was to give the 100*l.*, which the Testatrix had a power to dispose of; but I do not conceive that I can judicially declare it to have been executed." The only circumstance that has been pointed out as furnishing evidence of the testatrix's intending to execute the power in question, is the condition annexed to the devise to John Roake, the devisee for life, viz.: that he should, out of the rents and profits of the devised premises, keep them in tenantable repair. I say this is the only circumstance, because it has been fixed by many cases,† that using the words "my estate," although the subject of the power might have been at one period the property of the person to exercise, it will not be considered as in execution of the power. We are of opinion that the direction respecting the repairs, has no effect in proving, according to the authorities, that this testatrix meant to exercise here authority over the undivided moiety of this estate. It appears to us, that this would be to contradict that long list of decisions to which I have referred, and would be

* 2nd Merivale, Reports, p. 533. † Sugden on Powers.

to indulge an uncertain speculation in opposition to positive rules. There is no incongruity in directing a tenant for life of an undivided moiety, to keep his share of the premises in repair; a person with such an interest is not without remedies for enforcing repairs; and, at the worst, the devise would make him liable, as against the remainderman, for dilapidation.

It seems, therefore, to my brothers, as well as to me, that the question which your Lordships have been pleased to put to us should be answered in the negative, and that the will of Sarah Trymmer did not operate as an execution of her power.

The Lord Chancellor.—It does not appear to me that there is any real difficulty in the case; it is, therefore, my intention to move for your Lordships' judgment.

It will be proper that I should state very shortly the history of this case. It was an action of ejectment, brought in the Court of Common Pleas, for the purpose of recovering the possession of certain houses, situate in the county of Surry; the jury found a special verdict, and upon that special verdict the Court of Common Pleas pronounced judgment for the Defendant. A writ of error was sued out from that judgment, and the Court of King's Bench were of opinion, and, after argument, decided against the judgment of the Court of Common Pleas, which was reversed. The case then came, by writ of error, to your Lordships' bar, and upon that occasion, in consequence of the difference of opinion between the two Courts, as well as the importance of the question, it was considered by your Lordships

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proper, that the Judges should be requested to give their attendance. The Judges were accordingly summoned, and after the argument, this question was put to the Judges:—"Whether, upon the facts stated in the special verdict in this case, the will of Sarah Trymmer operated as an execution of the power of appointment of that moiety of the tenements in Surry, of which she was the tenant for life, with the power of appointment stated in the special verdict?" The Judges are unanimously of opinion, that the will did not operate as an execution of the power of appointment; and the opinion which they have so expressed, if sanctioned by your Lordships, substantially decides the present question.

The facts of the case, which raised this question, may be stated in a very few words. Sarah Trymmer was entitled to one moiety of these premises in fee; she was tenant for life of the other moiety, with a power of appointment in fee: under these circumstances she made her will, the terms of which have been read to your Lordships. The only material part to which it is necessary to refer is this:—"I hereby give and devise all my freehold estates in the city of London and county of Surry, or elsewhere, to my nephew, John Roake, for life, on condition that, out of the rents thereof, he do, from time to time, keep such estates in proper and tenantable repair; and on the decease of my nephew, John Roake, I devise all my said estates, subject to a charge of 30*l.* a year, to Ann, the wife of the said John Roake."

Now the law applicable to this question, as

has been stated by the Lord Chief Baron, has been settled by a long series of decisions, from the case which has been referred to in the time of Sir Edward Coke, Sir Edward Clere's case, down to the present time, that if the will, which is insisted upon as the execution of the power, does not refer to the power, and if the dispositions of the will can be satisfied without their being considered to be an execution of the power, unless there are some other circumstances to shew that it was the intention of the devisor to execute the power of appointment by the will, under such circumstances the Courts have uniformly decided that the will is not to be considered to be an execution of the power. Now, in this case there is no reference in the will to the power; there was other property in the county of Surry, sufficient to satisfy the terms of the will; and there is no circumstance whatever to satisfy my mind, as I conceive it ought to be satisfied, that there was a manifest intention in the testatrix to execute an appointment under the power given by this will.

Under these circumstances, I conceive I am bound to say, that whatever private opinion, whatever conjectural opinion, I may entertain respecting the intention of the testatrix, the will is not an execution of the power; and for these reasons, which have been stated more in detail by the Lord Chief Baron, I am of opinion, that the opinion which has been delivered by the Judges is correct, and that the judgment of the Court of King's Bench ought to be affirmed. I beg leave, therefore, to move that that judgment be affirmed accordingly.

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Lord Wynford.—After the opinion which has been delivered by the Lord Chief Baron, it is not my intention to occupy your Lordships' time for many minutes. The noble and learned Lord has referred to the history of this cause; I rather think that I am better acquainted with the history of this cause than the noble and learned Lord, for I was in the Court below when it was decided; and it is due to that Court to state, that no pains were spared in its decision, for it occupied the consideration of the Court six months—a longer time than any other case I remember: the Court were six months laboring upon the case before it was decided. After the opinion which has been expressed, I will not enter into the particulars of the cases which have been decided; my opinion was perfectly in accordance with those cases; and in the result to which I came, I considered myself as acting in conformity with the principles laid down in those cases.

The Lord Chief Baron has very truly stated, that this is a question of intention. I feel satisfied that if this question had been proposed to a thousand persons, nine hundred and ninety-nine would have been of opinion that the intention of this party was to give this property in execution of the power of appointment, and would have said that it is contrary to justice that these parties should not have it; but I agree with the Lord Chief Baron, that, unfortunately, we are confined by the rules which have been laid down. Rules, with respect to evidence of intention, are bad rules, and I trust I shall live to see them no longer binding on the Judges.

I agree that we must decide in conformity to

Clere's case, in which it has been decided that a power is not executed unless there be in the instrument in which it is professed to be executed, a reference to the power; or unless the estate in question is referred to, or that the instrument will otherwise be entirely inoperative. That is the principle stated by the Lord Chief Baron—that was the principle acted upon in this case by the Court of Common Pleas; and if the estate is not referred to, the judgment of the Court of Common Pleas is clearly inconsistent with the established cases: but I conceive the estate is referred to, and I beg leave to state, after having paid a great deal of attention to this subject, and I state that, without the possibility of contradiction by any noble or learned Lord, that this precise case never occurred before. There is no case to be found in the books, in which a decision has been pronounced, where the estates were in moieties; that is, where the party has one part of the estate in her own right, and the other under a deed connected with a power. If that case had been decided, I should have felt myself bound by it, and so would those Judges who concurred in the decision in the Court of Common Pleas.

Then the question is, whether we are bound in such a case;—whether it is one to which such technical rules apply. Is the estate referred to in this case? I conceive it is. The old lady, Mrs. Trymmer, had houses in Surry.

This cause has been under discussion in the Courts below, and in this House, from the year 1823 to the present time; I mention that, because it is a fit subject for the consideration of noble Lords. In 1823 this case was tried

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in the county of Surry, and from that time to the present, it has been in a course of litigation: I believe the whole property was worth only 1200*l*. She possessed these houses in the county of Surry, having purchased one moiety, and having the other moiety by the instrument executed on her marriage with her husband, by which she had the power to dispose of that moiety; so that she had the entire interest in one-half, and in the other an estate for life, with a power of disposition.

From the difference of opinion which we have witnessed in another case* to-day, nobody can be quite sure what is law, and what is not law; but I always supposed it to be law, that that which a party has a power of giving, must, under such circumstances, be taken to have been given; the testatrix had power over both the moieties of the estate—she had, therefore, a complete right over the whole. The words in the will, upon which this question arises, are these:—"I hereby
" give and devise all my freehold estates in the
" city of London and county of Surry, or else-
" where, to my nephew, John Roake, for his
" life, on condition that, out of the rents thereof,
" he do, from time to time, keep such estates
" in proper and tenantable repair; and on the
" decease of my nephew, John Roake, I devise
" all my said estates, subject to, and chargeable
" with, the payment of 30*l*. a year;" and so on. Now, when she says, "I give and devise all
" my freehold estates," what did she mean? We are told she meant only this:—I give all the estates in which I have a property, not

* *The King v. Westwood*, post.

those over which I have a power and control. But it is not sufficient to say, that, by the exercise of ingenuity, that may be made out to be the rule of construction; we must look at the whole instrument, and not at any particular part. In another place she directs, that the person who holds shall repair. Why, what is he to repair? Is he to repair one-half of the tenement, the other half being in another person? Is each to have the undivided moiety? If so, surely he cannot repair at all. It is clear, that in speaking of her freehold estates in the former part of her will, she is speaking of all her estates; and that in providing for the repairing and keeping up the estate, she meant him to repair and keep up the whole estate.

But whatever my opinion may have been, and however diligently formed, as long as I have the honour of sitting in this House, whenever the Judges of the land tell me what is the law, I will never vote against that which they declare to be the law; nor will I, by any argument on my part, endeavour to prevail on any of your Lordships to do so. Whenever there is a difference of opinion, I shall regulate my own opinion, as well as I can, by that which the learned Judges have declared as the law; and though agreeing in the rule, yet perceiving, as I did, the distinction which I have mentioned between this case and the class of cases which have been decided, I was induced to come to the result, which I expressed as my opinion in the Court below, I shall concur most cheerfully with the learned Lord on the woolsack, who has moved that the judgment of the Court of King's Bench be affirmed.

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Lord Tenterden.—I agree entirely with the unanimous opinion of the Judges, which has been delivered to your Lordships by the Lord Chief Baron; and I think, in such cases, it is much safer to abide by general rules and principles, than to enter into nice constructions by which we may be misled. The Court of King's Bench considered that this case was governed by the series of cases which had been decided; and that, in consequence, the will was not an execution of the power of appointment. Retaining that opinion, the grounds of which have been very clearly stated by the Lord Chief Baron, I beg to state, without further observation, that I concur in the motion that the judgment be affirmed.

Judgment affirmed.

IRELAND.

(COURT OF EXCHEQUER CHAMBER.)

OWEN WYNNE, Esquire, M.P. $\left\{ \begin{array}{l} \textit{Plaintiff} \\ \textit{in Error.} \end{array} \right.$

SIR GEORGE ABERCROMBIE ROBIN-
 SON, Baronet, FREDERICK JOHN
 PIGOU, and WALTER STIRLING, $\left\{ \begin{array}{l} \textit{Defendants} \\ \textit{in Error.} \end{array} \right.$
 Baronet - - - - -

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By the Irish statute, 10 and 11 Car. I. c. 2, s. 7, it is enacted, that charges imposed by any parson upon his benefice, shall be effectual for such time only as he shall be resident upon his benefice, without absence above eighty days in any one year; and that all covenants, bonds, statutes merchant, and of the staple recognizances, judgments, and all other like assurances, made, acknowledged, or suffered by any such beneficer, or collaterally on his behalf, for the enjoying the houses, lands, tithes, and other profits of such benefices, or any part thereof, otherwise, or for any longer or other time, or whereby any such beneficer shall be inforced to resign, &c.; and likewise all covenants, bonds, and other assurances, made, to the intent to force such beneficer to be resident, for the upholding of every grant, lease, alienation, or charge, &c. shall be void, to all intents and purposes. By the Irish statute, 10 and 11 Car. I. c. 3, it is enacted, that all grants, leases, alienations, charges, and incumbrances, made, &c. by any archbishop, or other dignitary ecclesiastical, parsons, vicars, &c. of any lands, tenements, or hereditaments, parcel of their possessions, other than such leases and grants as therein, or in any other Act passed in the then present session of Parliament, authorized, shall be void.

R. W. being possessed of a certain vicarage, and also a rectory and chantorship, in Ireland, in consideration of a sum of 6000*l.* advanced to him by the Globe Insurance Company, granted to them, and charged upon his said benefices, an annuity of 825*l.* 5*s.* Irish currency, for a term of 99 years, if

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R. W. should so long live. By a bond and warrant of attorney of the same date, with and reciting the indenture, and reciting that the annuity should be still farther secured by the bond and warrant of attorney, R. W. and O. W. became bond to certain trustees for the Globe Company, in a penal sum of 6000*l.* conditioned payment of the annuity.

Held, that the collateral security by the bonds was valid, although the charge on the benefice were void under the statutes.

BY an Indenture bearing date the 1st of February, 1811, made between Richard Wynne, Clerk, of the first part: Sir Thomas Theophilus Metcalfe, Baronet, George Abercrombie Robinson, Frederick John Pigou, Esquires, and Sir Walter Stirling, Baronet, Directors of the Globe Assurance Company, and Trustees on their behalf, of the second part; and Thomas Monsell, of the third part; after reciting that the said Richard Wynne was possessed of the Vicarage of Urney and Annagaliffe, the Rectory of Annagh, and the Chantorship of Elphin; and also reciting that the said Richard Wynne had effected an Insurance on his life, to the amount of 6000*l.* Irish currency; and that the said Richard Wynne had contracted with the Globe Assurance Company for an annuity of 825*l.* 5*s.* Irish currency, for a term of ninety-nine years, provided the said Richard Wynne should so long live: It was by the said Indenture witnessed, that in consideration of the said sum of 6000*l.* so paid to the said Richard Wynne, by the said Sir Thomas Theophilus Metcalfe, George Abercrombie Robinson, Frederick John Pigou, and Sir Walter Stirling, on behalf of the said company; and

also in consideration of 10*s.* he the said Richard Wynne did give, grant, bargain, and sell, to the said Sir Thomas Theophilus Metcalf, George Abercrombie Robinson, Frederick John Pigou, and Sir Walter Stirling, their executors, administrators, and assigns, one annuity or clear yearly sum of 825*l.* 5*s.* of lawful money of Ireland, to be paid and payable during the said term of ninety-nine years, if the said Richard Wynne should so long live, to be charged and chargeable upon, and yearly issuing and payable out of, all that and those the several tithes, glebes, and glebe lands, profits, salaries, and emoluments arising out of, or in, or belonging to, the said united Vicarages of Urney and Annagaliffe, otherwise Cavan; and said Rectory of Annagh, otherwise Bulturbet, and the said Chantorship of Elphin, and the said glebe lands and rectorial tithes of the Parishes of Kilcola, Kilcorkey, Creeve, and Kilmacumpsey; and out of all privileges, profits, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever, to the said benefices, tithes, glebes, hereditaments and premises, thereby charged with the payment of the said annuity, or yearly rent, or sum, belonging or appertaining, or known or deemed, to be part and parcel thereof: To hold, receive, and take the said annuity, or yearly rent or sum of 825*l.* 5*s.* unto the said Sir Thomas Theophilus Metcalfe, George Abercrombie Robinson, Frederick John Pigou, and Sir Walter Stirling, their executors, administrators, and assigns, for the said term of ninety-nine years, to commence from the day before the date of the said Indenture, if the said Richard Wynne should so long live, and to be

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paid and payable quarterly at the times and places therein mentioned, without any deduction or abatement whatsoever out of the same by authority of Parliament or otherwise howsoever; the first quarterly payment of the said yearly rent to be made on the 19th day of May then next ensuing, if the said Richard Wynne should be then living; and if the said Richard Wynne should happen to die before any of the said quarterly days, then a proportionate part of the said annuity was to be paid.

The deed contained a power to Sir Thomas Theophilus Metcalfe, George Abercrombie Robinson, Frederick John Pigou, and Sir Walter Stirling, their executors, administrators, and assigns, to enter and distrain the benefices, glebes, and premises, if the annuity or yearly rent were not paid within twenty-one days from the respective days of payment, and to dispose of the distress so made in like manner as distresses taken for rent:—And also a further power to Sir Thomas Theophilus Metcalfe, George Abercrombie Robinson, Frederick John Pigou, and Sir Walter Stirling, their executors, administrators, and assigns, in case the rent-charge should be unpaid for thirty-one days after any of the said days, to enter, although no legal demand had been made, and to hold, receive, and take the said benefices and premises, and the profits thereof to their own use, until the annuity and all arrears should be satisfied.

It was by the Indenture also witnessed, that in consideration of the said sum of 6000*l.* and for more effectually securing the said annuity or yearly rent of 825*l.* 5*s.* and in consideration of

10s. paid to said Richard Wynne by said Thomas Monsell, he, the said Richard Wynne, at the request and on the nomination and appointment of the said Sir Thomas Theophilus Metcalfe, George Abercrombie Robinson, Frederick John Pigou, and Sir Walter Stirling, testified by their being parties to and executing the said deed, did grant, bargain, sell, and demise, to the said Thomas Monsell, his executors, administrators, and assigns, all that and those the said benefices, tithes, glebes, hereditaments, salaries, emoluments, and premises, therein before mentioned, and thereby charged with the said annuity or yearly rent, with the appurtenances, to hold the same, with their appurtenances, unto the said Thomas Monsell, his executors, administrators, and assigns, for the term of 500 years from thence next ensuing, provided the said Richard Wynne should so long live, upon trust that if the said annuity or yearly rent of 825*l.* 5*s.* should at any time be in arrear for forty days next after the same ought to be paid, then that the said Thomas Monsell, his executors, administrators, or assigns, should, out of the said benefices, &c. and out of the rents, &c. thereof, or by leasing, demising, or mortgaging, or selling the same premises, or any part thereof, raise such sum of money as would be sufficient for payment of the said annuity, and all arrears thereof, and all costs attending the recovery thereof.

By a bond and warrant of attorney, bearing date the 1st of February, 1811, and reciting the indenture of the same date, *and that the said annuity should be still further secured by the said bond and warrant of attorney*, and also reciting

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that the said Richard Wynne should be at liberty to repurchase the said annuity upon such terms and conditions as were mentioned in the said Indenture: the said Richard Wynne and Owen Wynne, the Plaintiff in Error, were jointly and severally bound to the said Sir Thomas Theophilus Metcalfe, George Abercrombie Robinson, Frederick John Pigou, and Sir Walter Stirling, in the penal sum of 6000*l.* of lawful money of Ireland, to be paid to them, their heirs, executors, administrators, and assigns, and every of them, conditioned for the payment of the said annuity or yearly rent of 825*l.* 5*s.* or of such part thereof as should not be repurchased pursuant to the agreement, on the days and times mentioned in the before-recited Indenture, and also for the payment of any proportional part of the annuity or yearly rent, in the event of Richard Wynne's dying before the period when any of such quarterly payments should become due.

In Trinity Term, 1816, separate judgments were entered on the said bond and warrant of attorney, against Messrs. Richard and Owen Wynne, in the Court of Exchequer; Mr. Richard Wynne having, as the Globe Insurance Company alleged, suffered an arrear to grow due of the said rent charge, amounting to the sum of 321*l.*

The Plaintiff in Error was applied to for payment of these arrears, and he having declined to pay the same, a suggestion was filed upon the conditional bond against him and his brother the said Richard Wynne.

On the 25th of April, 1825, the Plaintiff in Error obtained an order from the Court of Exchequer, by which the Globe Insurance Company was

ordered to declare on the bond, and on or about the 8th day of June, 1825, the said Company filed a declaration on the said bond, to which the Plaintiff in Error pleaded first, *Non est factum*; Secondly, *that the deed was void, as affecting ecclesiastical benefices, with cure of souls*; Thirdly, *that supposing the deed was originally valid, it had become void, because the said Richard Wynne had not resided on his benefices without absence for eighty days in any one year since the date of the said indenture and writing obligatory*: Fourthly, that the Plaintiffs had released 20*l.* 18*s.* 4*d.* part of said annual sum of 825*l.* 5*s.*: and, Fifthly, that the consideration of the bond was usurious.

On the first plea of *non est factum*, and the fifth plea of usury the Plaintiffs joined issue, and to the second and third pleas they filed a general demurrer, and to the fourth plea they filed a special demurrer; the Plaintiff in Error rejoined issuably to the replication to the first and fifth pleas; and joined in demurrer as to the other pleas; and on the 17th day of May, 1826, the issues in fact came on to be tried, when a verdict was had for the Defendants in Error on both issues.

By the Irish statute 10 and 11 Car. I. c. 2, s. 7, it is enacted, that all alienations, charges, and incumbrances, imposed or suffered by any parson, vicar, or beneficer of any benefice, having cure of souls, within the kingdom of Ireland, of or upon his benefice, or any part thereof, shall be effectual for such time only as such beneficer shall be resident upon his said benefice, without absence from the same above eighty days in any one year; and that all covenants, bonds, and

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other assurances, thereafter made or acknowledged by any such beneficer, or collaterally on his behalf, for the enjoying the houses, lands, tithes, and other profits of such benefices, or any part thereof, otherwise, or for any longer or other time than as aforesaid, shall be utterly void. And by the Irish statute, 10 & 11 Car. I. c. 3, it is enacted that all grants, leases, alienations, charges, and incumbrances, to be made, done, or suffered by any archbishop, bishop, dean and chapter, archdeacon, prebendary, or other dignitary ecclesiastical, parson, vicar, &c. of any lands, tenements, or other hereditaments, parcel of their possessions, or in any way belonging to the same, other than such leases and grants as therein, or in any other act made in the then present Parliament expressed or authorised to be made, shall be utterly void.

The general demurrers were argued in the Court of Exchequer in Ireland, in Easter Term, in the year of our Lord 1826, and judgment given against the Plaintiff in Error. The special demurrer was abandoned.

The Plaintiff thereupon brought his writ of error on the judgment of the Court of Exchequer, to the Court of Exchequer Chamber in Ireland, where the same was argued, and the judgment of the Court of Exchequer was affirmed.

For the Plaintiffs in Error.—*The Solicitor General* and *Mr. Swanston*.

It has been frequently decided upon the law of England, that when a beneficed clergyman has executed an instrument, affecting his bene-

fice, and does not reside for the number of days requisite, or is absent beyond the number of days permitted, his grant becomes void instantly, *ipso facto*; and it has been settled, that a party who has chosen not to reside, can take advantage of the invalidity of the instrument he has executed, and which has become void by his own non-residence. It is the policy of the act that makes it void; the act has directly and imperatively avoided the operation of all such instruments: and although the party may, by his own absence, have caused the illegality of the deed, he may take advantage of it and recover his property precisely upon that ground.*

By the statute law of Ireland, every annuity upon a benefice, not a lease to hold to farm in the way provided by the statute, becomes void to all intents and purposes whatsoever, and therefore there could not be any security upon a benefice in Ireland.

It was held, before the late act, in England, that the statute of Elizabeth† had the same operation, and that you could not grant any rent-charge or annuity, or lay any burthen upon any property belonging to the church, in consequence of that statute, except in the manner authorised by the statute itself. By this statute a deed of demise, or a grant with power of distress and entry, were altogether void by the law of Ireland. If the question depended simply upon that point, it would be argued that, according to decisions in this country, if there be an independent covenant in a deed to secure an annuity, upon that covenant

* *Frogmorton v. Scott*, 2 East, 467.

† See 13 Eliz. c. 20; 14 Eliz. c. 11; 18 Eliz. c. 11; and 43 Eliz. c. 9.

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a party may recover, although the grant *quoad* the benefice was void by the statute. I need not trouble myself with that view of the case, because the Irish statute makes not only the instrument itself but every collateral security utterly void, to all and every intent and purpose whatsoever, if there is not a residence for eighty days.

As representing the Plaintiff in Error, I stand in a different situation, and in a better situation than the grantor could have stood in, because a surety comes in without any consideration, and can only be bound literally as far as the law has bound him, and as far as there was a binding contract, beyond that which is altogether a strict and legal consideration.

Although where a thing is forfeited by the common law, as if you give a bond to do that which is prohibited by the common law, (I am not speaking of a thing *malum in se*, but a thing prohibited) and the bond is also for doing something legal, the common law will arrange the matter, and consider the bond good as to part, and bad only as to that which is illegal. That is not the statute law; but if a statute imperatively provides that, upon the happening of a particular event, the instrument shall be utterly void in law, to all and every intent and purpose whatsoever, it is not in the power of any Judge to uphold any part of the instrument, and to give it an independent and abstract operation, as a separate matter, and not depending upon, or connected with, that which must be void, as within and contrary to the words of the act.

In the case of *Lee and his Wife v. Coleshill*,* it

* Croke Eliz. 529.

was said by Drewe to have been held in the Queen's Bench, that if a parson makes a lease, which is void by the statute for non-residence, and there is an obligation for the performance of covenants, although there be some covenants therein which do not concern the lease, yet the bond is entirely void; otherwise all the meaning of the statute should be defrauded, by putting in a lawful covenant within the indenture.

Another case, establishing the same proposition, is *Sir Daniel Norton v. Symmes*. * There the distinction was precisely taken between a bond to do that which is partly void in law, and that which was to secure a thing made void by statute.† The act provides that the moment the beneficer ceases to be resident for a period of eighty days, then the whole instrument becomes utterly void in law, to all intents and purposes: this is an act that allows of nothing but a strict construction. No construction can be given in lieu of that which the act has directed; the act has expressly directed, in so many words, that he shall not be absent more than so many days. It leaves him to be absent, if he pleases, but it states the result of that absence; and it is a remarkable circumstance as to that clause, that at the latter end of it, it makes void any obligations to enforce his residence. It might have been supposed that the object was, that the beneficer should reside, and that an obligation to enforce his residence would have been reasonable, and consistent with the view of the legislature; but by that provision it was meant, that every instrument affecting to

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* Hobart's Reports, p. 12.

† See *Mouys v. Leake*, 8 Term Rep. 411.

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charge a benefice, should be destroyed utterly in case he should not be actually resident during the whole year, except eighty days, and it makes void any obligation which was given by any party that he should reside: they meant that the party, in case of non-residence, by which the instrument should become void, should not have any security against the benefice; it did not mean that any body dealing with a security upon a benefice, should have any security against the parson; it was not merely against the benefice, if he did not reside, but that he should not have any security against the person of the parson, or the property of the parson, in consequence of his non-residence; so that the policy was not merely to cut down the grant, as affecting the benefice, that was only one part; but another part of the object of the policy was to cut down and utterly render void every attempt to compel him to reside; the effect of which, if allowed to be legal, would be, that they could recover at law for the loss they sustained by his non-residence, which was not the intention of the act in allowing him to exercise the condition which the freedom from residence would allow him, of residing as long or short a time as he pleased: the act not simply contented itself with avoiding the deed, but every collateral engagement which, in any way, might be made dependent upon the principal instrument, the object of which was to charge the benefice.

The inference which we draw from this is, that you cannot, by the law of England, take any collateral security for enforcing any obligation which primarily was to press upon a benefice,

which primary first obligation becomes void by force of the statute. Suppose that the instrument had been in the common form of the grant of an annuity ; and then suppose it had occurred to the parties that he might not reside for the whole time, and that they said, "If he does not reside, we shall lose our annuity, and we will make a covenant that he shall reside ;" their intention would have been to have made him answerable in damages in case he did not reside, and by that means sustaining the deed ; the act says, you shall not do that, and any attempt to do it shall be void, the deed shall be void to all intents and purposes. Now if you cannot, by implication, compel him to reside, you observe that this operates by positive enactment.

The Lord Chancellor.—This is a separate and entirely independent bond, to secure this annuity.

The Solicitor General.—I am coming to that. I say first, you cannot have any collateral security.

The Lord Chancellor.—Collateral security for what purpose ?

The Solicitor General.—If this case is to be looked at as upon an independent bond, there is nothing to decide. I wish to establish, before I enter upon that question, that in point of law it is impossible for a man to have any security upon a benefice, or any security by collaterally securing that which was imposed upon the benefice. If he could, where is the meaning of the act of parliament which says, you shall not have any obligation binding him to reside ? What is that but a general declaration, that you shall not bolster up or aid, by collateral assurances, that security which the legislature has forbidden by the

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positive enactments of the statute. If it be so, the question properly arises upon the terms of this bond. Where there are several instruments, not executed merely at the same time, but all having one common object, and made for one common purpose, they are considered and treated in law as one assurance, so knit and bound together by the interest of the parties, that they receive one common interpretation, and must abide one common fate. Whatever affects the validity of one will affect the validity of all; and unless all the parts of the security for charging this benefice can be supported, and unless they are supported throughout, as a charge in the way in which they were created, no one part can be of the slightest importance.

In this case, in every part of the bond the deed is referred to. It is a deed not simply to secure an annuity as a mere abstract matter, not standing by itself, but to secure an annuity already secured by an indenture, bearing even date therewith; and it is recited that the object was further to secure that very annuity of 825*l.* 5*s.* to be paid at the same days and times as are appointed for the payment of the said annuity, in and by the above in part recited indenture.

Mr. Serjeant Taddy.—That is not in the bond itself.

The Solicitor General.—It does not signify whether the words are in the bond; I do not find them, but it is quite sufficient for me that the bond recites and refers to the deed, which is a deed granted and taken, in so many words, to secure an annuity upon a benefice, and that that annuity or annual sum was intended to be still

further secured by this obligation and warrant of attorney: not that that would be necessary, because when instruments are executed at the same time, they form one and the same assurance; and if they are within the policy or the provisions of the act, it is quite clear that they are struck at, although they should not contain the slightest reference to the particular instruments; but here they appear upon the very face of it: if it had not been for that, the pleadings would have been differently framed: it is declared upon as being an instrument for further securing the said annuity or annual sum, which was granted by that deed.

Our pleas are founded upon the acts of parliament; they have not set forth all the instruments, but they have set forth quite sufficient for the purpose for which I am to argue the case.

Then, as the bond is for further securing an annuity, granted and secured by a deed, and that deed is destroyed by the act of the legislature, there cannot be any further security for that which has ceased, and it falls directly within the words of that clause, and within the policy of the act. It is an instrument to secure an annuity, and if the annuity has ceased to exist, there can be no security. It is not like a contract, where there is a valid security remaining. My case does not depend singly upon cap. 3 of the statute; if it depended singly upon that, it might be said there was a good security for the annuity, although a bad contract for charging the annuity. My case is one where the whole transaction is struck at the instant the eighty days have expired; that instrument, the whole instrument, becomes null and void, to all intents and purposes, in the law.

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Then there is no annuity existing ; it is not simply the charge that is to become void, because any collateral engagement, compelling him to reside, would be equally void. How can a man recover from a surety that which has ceased to have existence against his principal ? How can that which the law has avoided as a charge, become operative as against the surety ?

If I enter into a bond to secure an annuity already secured upon property of a sufficient value, I have a confidence that the estate will answer the charge. I may, therefore, with great propriety, enter into the bond as a collateral security, to secure that which has already been secured upon the property, because I know the grantee will necessarily and naturally go to the property ; if he proceeds against me, I can go against the property. But if my engagement, which is only collateral, to secure that which is already secured upon the property, becomes a subsisting, operating, and binding engagement against me, not as a further security, but the original and only security ; not because the original security is altered in point of value, but because it is destroyed by the operation of the act : you not only break in upon the words and evade the policy of the act, but you altogether alter the nature of the obligation into which I have entered. I entered into it as a security to guarantee, by my bond, the due payment of this annuity, secured upon this benefice ; and whilst it is secured upon that benefice, I am content to be a collateral guarantee, but I am not content to be the only guarantee. I never meant to enter into an engagement, nor have I, to secure an annuity

in the abstract, but only an annuity secured upon that benefice ; and the instant that annuity ceases to bind the parties, that instant my security fails.

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A bond of this nature cannot, in point of law, be considered as any thing more than a collateral security to secure an annuity out of the profits of the rectory. How would it operate? The act intends to cut down the security altogether, the moment the party ceased to reside for the time specified ; they meant that there should be no security operating upon him, because it is intended and said that he shall not be compelled to reside, and that any deed with that object shall be void : when he goes back, he is to be discharged of the incumbrance upon the property. Now, as the original grant was upon the benefice, I shew what the contract was. There was no contract to buy an annuity to be secured by the bond of the Messrs. Wynne ; it was to buy an annuity secured upon the benefice, and collaterally by the bond. Is it possible to contend that the statute strikes at the annuity, but leaves untouched the bond where the original object is to bind the grantor and not the surety ? *Cui bono*—what is the use of his attempting to get rid of an objection that presses upon the living, if his personal liberty is in danger, and he has property which would be subject to be taken ? The effect of the bond remaining valid would be, that judgment would go upon the bond, and the party would be taken in execution, and then sequestration would follow. Can any thing be considered so absurd, as that an act which means to strike at the security, and cut it down, should in this man-

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ner have its operation entirely defeated? If the bond remains valid, it must be so to all intents and purposes; the effect of its remaining valid will be, that the living may be taken in sequestration, and the whole profits of the living, *minus* some trifle to perform the cure, in direct violation of the policy, and the regulations of the statute only should be considered as applicable, and made applicable, to the payment of every annuity granted by and issuing out of an instrument that has become null and void.

Supposing the whole transaction valid, and supposing the obligor called upon, in virtue of his obligation, to discharge any part of this annuity, he would be entitled to stand in the place of this annuitant, as an incumbrancer upon the benefice. That was the nature of the transaction into which this obligor entered; he became not the primary security for the payment of this annuity, but the annuity being already secured upon the benefice, he became bound as a collateral security for the payment of the annuity.

The Lord Chancellor.—If the original incumbrance is not effectual, he could not vary the right of the annuitant: he must be left to his personal remedy.

Mr. Swanston.—But the transaction is assumed to be originally valid in all its parts; one of those parts was a charge upon the benefice; another part of the transaction was this bond, given by the Appellant. You cannot apply any doctrine of divisibility to the conditions of such a bond, because the obligor will be placed in a very different situation from that in which he has contracted to place himself. If the whole condition

is valid, which it might have been if non-residence had not occurred, the obligor contracted for the payment of this annuity as a surety, having the benefit of the primary security for the payment of the annuity. If the doctrine of divisibility can be applied to the conditions of such a bond, this is not a case in which it would be right to apply it; it would be varying, to his prejudice, the condition of the obligor, without any reason that can be suggested. This is an entire obligation, a bond for the payment of the annuity; and in that character it is void, because it is so declared by the terms of the statute, in respect of its being a bond given for the payment of an annuity charged upon a benefice, the incumbent of which has ceased to be resident during the time specified in the statute. The result is, that his charge has become either void or ineffective, and the bond has, within the terms and provisions of the statute, become void to all intents and purposes; and being so void, it cannot be declared valid. There is a broad distinction between this case and the cases where there is an instrument with two distinct bonds, capable of taking different operations. Such cases, I submit, can have no possible application to this case; it is the case of an entire instrument, one entire obligation, and that obligation is declared by the terms of the statute void.

The Lord Chancellor.—The bond is for a personal contract.

Mr. Swanston.—Yes; it is for the payment of an annuity: it is a part of the transaction by which the annuity is charged upon the benefice. The bond is dated on the same day, and recites

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that it is given as a further security for the payment of that annuity; the non-residence of the incumbent has placed the annuitant in such a situation, that it is not an effective charge upon the benefice.

The Lord Chancellor.—May it not be good as an annuity, though not effective as a charge?

Mr. Swanston.—I am content to admit that it may, upon the covenant.

The Lord Chancellor.—The charge is gone, but there is a personal obligation in the bond for the payment of it.

Mr. Swanston.—Admitting that the annuity is valid, as depending upon the covenant of the grantor; the operation of this act does not at all impeach it, but it declares the bond void to all intents and purposes. It was a bond given to secure the payment of an annuity, so charged and circumstanced, that it came within the operation of this section.

The Lord Chancellor.—Is this a bond for the enjoying of the houses, lands, tithes, and other profits or hereditaments of such benefices, or of any part thereof?

Mr. Swanston.—The annuity being charged upon this benefice, the annuitant has a definite interest in the profits of the benefice, and he could have resorted to various modes for making effectual the charge upon the benefice, so as to give him a personal interest in the profits of the benefice: such an annuity, so charged and secured, is an interest in the profits of the benefice, within the terms of the act.

Suppose an annuity were charged upon a benefice, and payable no other way whatever; not



only without any covenant by the grantor, but containing an express stipulation that payment should not be enforced, except out of the profits of the benefice; then I will suppose further, that after the grant of that annuity, the grantor of that annuity shall so absent himself, that the grant is inoperative.

The Lord Chancellor.—Do you mean, under the circumstances supposed, the bond being out of the question, that no remedy could be had against the party? Do you mean to say no action could be maintained against the clergyman?

Mr. Swanston.—Not upon the demise.

The Lord Chancellor.—But upon the grant of the annuity.

Mr. Swanston.—Yes.

The Lord Chancellor.—There is his personal obligation, and a security upon the estate.

Mr. Swanston.—As regards the grantor, or his personal obligation, and the security, I am bound to admit that the personal obligation may be good, though the grant was void.

The Lord Chancellor.—And that personal obligation might have been enforced.

Mr. Swanston.—That personal obligation might have been enforced against the covenantor.

The Lord Chancellor.—If it might be enforced with reference to the benefice, what is there to prevent the personal obligation in law being further enforced by a bond?

Mr. Swanston.—Nothing, if it rested there; but that is not the nature of this bond: it imports to secure the annuity as an annuity charged upon the benefice.

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The Lord Chancellor.—Does it? What is there in the bond that does that?

Mr. Swanston.—It expressly refers to it.

The Lord Chancellor.—It is the intention that it should be still further secured: it says it is secured in a particular way as a charge upon the benefice: the object of the bond is, that it should be still further secured by the personal obligation of the party.

Mr. Swanston.—Such a personal obligation is void, because it is an obligation to secure an annuity upon a benefice. There is nothing to enable you to say there are two obligations in the bond. As a bond to secure an annuity, it is void by non-residence, and there is nothing to enable you to distinguish two obligations.

The Lord Chancellor.—The obligation appears to me a mere obligation that he shall pay the annuity at the times mentioned, without any reference to the subject matter.

Mr. Swanston.—There is no other reference to it than a reference to the indenture.

The Lord Chancellor.—That is a short mode of identifying the annuity.

Mr. Swanston.—This annuity is charged by this indenture, and the bond is given as a further security for the payment of the annuity; it was a mode of appropriating the profits of the benefice which the incumbent had undertaken to make. This bond could not have been enforced, if the demise had been made effectual, and if the annuitant had had the benefit of it.

The Lord Chancellor.—I do not consider the bond given to enforce that which could not, in

point of law, be enforced, but to supply the defect in the event of the party not residing.

Mr. Swanston.—During that period the payment of the annuity might be enforced; this annuity was good in the beginning, its operation was limited by a subsequent event: this was a good annuity when charged upon the profits of the benefice. While the transaction remained in that state, this bond was a collateral security for an annuity out of the profits of the benefice.

The Lord Chancellor.—There you assume a point you are not entitled to assume; it is a grant of a personal remedy against the grantor, and there is also a security upon this estate. There is also an obligation entered into by a surety, to perform a personal obligation to pay the annuity at the times specified, without reference, as it appears to me, to the benefice. I entertain this opinion so strongly, I do not think it necessary to hear the other side. If the other Noble Lords agree with me, the House will affirm the Judgment.

This is a proceeding against a surety. The allowance of costs is a matter of discretion, and I do not give any recommendation that there should be costs.*

Judgment affirmed, without costs.

* *Serjeant Taddy* and *Mr. Kaye* appeared for the Respondents.

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IRELAND.

(COURT OF CHANCERY.)

JOHN FRANKLIN and RICHARD
 FRANKLIN, otherwise RICHARD } *Appellant.*
 FRANKLIN GOUGH - - - -

ROBERT LATOUCHE, PETER LA-
 TOUCHE *the Elder*, JOHN DAVID
 LATOUCHE, PETER LATOUCHE } *Respondents.*
the Younger, HENRIETTA GOUGH,
 and MARIA RYLANDS - - -

By Original Appeal.

JOHN FRANKLIN, and RICHARD }
 FRANKLIN, otherwise RICHARD } *Plaintiffs.*
 FRANKLIN GOUGH - - - -

ROBERT LATOUCHE, JOHN DAVID
 LATOUCHE, PETER LATOUCHE,
 HENRIETTA GOUGH, and MARIA } *Respondents.*
 RYLANDS - - - - -

By Revived Appeal.

A Bill having been filed by the devisees under a will, to revive and have the benefit of a suit instituted by the testator, to set aside a conveyance and mortgage of lands, on appeal against the decree, and order on farther directions in this suit, it appeared that there was a subsequent will, and that R. G., one of the Appellants, the devisee under that will, was not a party to the suit, but that an agreement had been made between him and the parties to the suit and the appeal, that the proceedings should be carried on for the benefit of the party who should appear to be entitled. Upon the hearing

of the appeal, it was adjourned, with liberty to make R. G. a party to the revived suit: Whereupon R. G. filed a bill against all the parties, including an assignee under his insolvency, setting up the second will, and claiming, as executor and devisee, the benefit of the former proceedings. By the decree upon the hearing of this suit the benefit of the former decree and proceedings was given to R. G., as executor; but *quâ* devisee his bill was dismissed, and it was also dismissed as against the assignee under his insolvency.

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Under these circumstances the case again came on by appeal, but was again adjourned, with liberty to supply the defect of parties under the decree, there being neither devisee nor assignee before the Court.

Some years after this adjournment, a bill was filed by R. G. and his assignee, stating that the Defendants in the revived suit were cognizant of the second will and its contents, and the agreement between the original Plaintiffs in the suit and R. G., and that with this knowledge they acquiesced in those proceedings, and on that ground praying the benefit of the original decree and the former proceedings. The fact of knowledge and acquiescence was denied by the answers, and not proved in the cause. The bill was dismissed on the ground of this defect of proof, and the decree affirmed on appeal.

Whether, (if the allegations had been sustained by proof,) an agreement not stated in the pleadings, but kept out of the view of the Court, could under these circumstances have been carried into effect by the decree of the Court; and whether there was between the Plaintiffs in the original and supplemental suits such privity as to entitle the latter to the relief obtained by the former.—*Quære*.

ON the 8th of November, 1803, Thomas Gough filed a bill in the Court of Chancery of Ireland, against David Latouche (since deceased), John Latouche (since deceased,) and Peter Latouche the elder (since deceased), impeaching a sale and conveyance made by the said Thomas Gough to the said John Latouche, by a deed dated 1st August, 1786, and a mortgage made by him, by deed dated 25th October, 1783, to the said David

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Latouche, in trust for himself and his copartners, the said John Latouche, and Peter Latouche the elder, of certain lands in the county of the city of Limerick, which the said Thomas Gough held by lease for lives, with a covenant for perpetual renewal. The Defendants having put in their answers, and issue having been joined, witnesses were examined in the cause, but Thomas Gough died on the 8th November, 1804, before publication had passed.

Thomas Gough executed two wills—the one dated 19th August, 1804, and the other the 30th September in the same year; by the first he devised his real estates to John Hamilton and William Crawford, in trust for his youngest daughter, Maria Gough, in tail, and appointed the said John Hamilton and William Crawford, and George Lloyd, and his the testator's wife, Henrietta Gough, his executors and guardians of his said daughter. By the latter he devised his real estate to his nephew the Appellant, R. F. Gough, by his then name of Richard Franklin, subject to a charge in favour of the said Maria Gough, and appointed the said Appellant, R. F. Gough, and the other Appellant, John Franklin, his executors.

Upon Thomas Gough's death, the first of these wills was found uncanceled, the latter not being then discovered.

On the 21st November, 1804, the said John Hamilton, William Crawford, George Lloyd, and Henrietta Gough, together with the said Maria Gough, then an infant, filed a bill against the said David Latouche, John Latouche, and Peter Latouche the elder; and also against John Bourke, therein stated to be the assignee of the estate of

Thomas Gough, who had taken the benefit of an insolvent act, and also against the three other daughters and co-heiresses of Thomas Gough, and their respective husbands; and also against the Appellant R. F. Gough, and others, praying that the first (then supposed to be the only) will might be established, and that their bill might be deemed an original bill, in the nature of a bill of revivor and supplement, and that they might have the benefit of the suit instituted by Thomas Gough, and the same relief on the hearing of their cause as Thomas Gough would have been entitled to if he had lived to prosecute his cause to a hearing.

The Defendants to the last mentioned bill having put in their answers, and witnesses having been examined on the part of the Plaintiffs and Defendants, the last mentioned cause came on to be heard, before the Lord Chancellor of Ireland, on pleadings and proofs, and by the decree, bearing date the 28th of June, 1806, the deed of the first of August, 1786, was set aside, and the Plaintiffs declared entitled to redeem the mortgage of 25th October, 1783, and accounts were directed to be taken of the sums due to the said David, John and Peter Latouche, on foot of the mortgage, and of all sums advanced by them to or for the use of Thomas Gough, and of what they had, or without their wilful default might have received out of the mortgaged premises.

The cause was reheard on the application of John Latouche, and an order made on the 29th of April, 1807, confirming the decree of the 28th of June, 1806, subject to trifling variations.

The Master made his report in the cause, bearing date the 23d of December, 1807, and

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David Latouche and John Latouche, and Peter Latouche the elder, having taken exceptions thereto, the cause came on to be heard, before the Lord Chancellor of Ireland, on the exceptions and further directions, on the 23d March, 1808, when some of the exceptions were allowed, and by an order of that date, it was referred to the Master, to rectify his report, according to the rules made on the said exceptions.

In pursuance of the said last mentioned order, the Master made his further report, bearing date the 23d May, 1808, and thereby reported a balance due to David Latouche, John Latouche, and Peter Latouche the elder, to the 1st of May, 1808, of 4755*l.* 4*s.* 9*d.*

Exceptions were taken by the Plaintiffs and the last mentioned Defendants in the cause, and the cause came on to be heard before the Lord Chancellor on such exceptions, and on the Master's said reports, and on the merits, on the 27th day of June, 1808, when the exceptions were overruled, and by an order of that date, the last mentioned report was confirmed : And it was ordered that the Plaintiffs should be put into possession of the lands in question, on payment of the said sum of 4755*l.* 4*s.* 9*d.*, with interest from that day, to the said John Latouche.

Pending the proceedings in the last mentioned cause, the Appellant, Richard Franklin Gough, set up the will of Thomas Gough, dated 30th September, 1804; and by an agreement, bearing date the 28th August, 1805, privately made between the Appellant, Richard F. Gough, and the Plaintiffs in the cause, it was agreed between them, that the suit revived by the Plaintiffs should be

prosecuted to a decree in their names, for the benefit of the parties who might ultimately appear beneficially interested in the subject matter thereof, under whichever of the two wills should be established; and thereupon the name of the Appellant, R. F. Gough, was struck out of the revived suit as a party.

On the 18th of October, 1808, the sum of 4755*l.* 4*s.* 9*d.*, together with subsequent interest thereon, amounting to 5143*l.* 15*s.* 3½*d.* was paid by the Appellant, Richard Franklin Gough, on behalf of the Plaintiffs, and the Plaintiffs were let into possession of the lands in question pursuant to the order of 27th June, 1808, and the title deeds were delivered up to them.

John Latouche died in 1810, leaving the Respondent, Robert Latouche, his heir at law; and by his will appointed the last named Respondent and John Latouche, since deceased, his executors.

In February 1814, an appeal was presented to the House of Lords by Maria Gough, then Maria Rylands, and the Appellant, Richard Franklin Gough, against the order of the 23d March, 1808, and the final order or decree of the 27th June, 1808, to which appeal David Latouche, since deceased, and Peter Latouche the elder, and Robert Latouche and John Latouche, since deceased, were Respondents. The appeal came on to be heard on the 20th May, 1818, when the House declared that the Appellant, R. F. Gough, ought to be made a party to the original and revived cause; the hearing of the appeal was adjourned *sine die*; and on the 10th day of June, 1818, it was ordered that the parties in the appeal should be at liberty to take such proceedings in the

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Court of Chancery in Ireland as they should be advised, in order to make proper persons parties to the original and revived cause, and bring all proper parties before the House.

David Latouche died pending the appeal, and by his will appointed Peter Latouche the elder, and George Latouche, John David Latouche, and Peter Latouche the younger executors. The appeal was revived against the said George, J. D. and Peter Latouche, who alone proved the will of David Latouche.

The Appellant, Richard Franklin Gough, on the 7th November, 1818, filed a bill in the Court of Chancery in Ireland against Peter Latouche the elder, and Robert Latouche, and against John Latouche (co-executor with Robert Latouche under the Will of John Latouche), and against George Latouche and the Respondents, John David Latouche and Peter Latouche the younger, and against the said Respondent, Henrietta Gough, *and the Appellant John Franklin*, and Maria Rylands, and against John Massey, the assignee under the insolvency of the Appellant, Richard Franklin Gough, praying that he and the said Appellant, John Franklin, might be decreed the benefit of the said suit instituted by Thomas Gough, and revived by John Hamilton, William Crawford, George Lloyd, Henrietta Gough, and Maria Rylands, and of all proceedings, orders, and decrees in the original and revived suit, so that he might be entitled to appeal therefrom. By decree bearing date the 10th of May, 1819, it was declared that the Appellant, *Richard Franklin Gough was entitled as executor of Thomas Gough* to the benefit of the proceedings in the pleadings

mentioned, but his bill as devisee of Thomas Gough, and as against John Massey, was dismissed.

Sometime after the decree was pronounced, the Appellant, Richard Franklin Gough, and Maria Rylands, amended their original petition of appeal, by adding John Franklin as a party Appellant; and naming Peter Latouche the elder, Robert Latouche, John Latouche, George Latouche, Peter Latouche the younger, and John David Latouche, as parties Respondents; and the Appellants, lodged a supplemental case in the appeal, stating the proceedings had in the Court of Chancery in Ireland subsequent to the hearing of the appeal in May 1818.*

John Latouche, the co-executor with Robert Latouche, under the will of John Latouche, the party to Thomas Gough's original bill, died in January 1820.

The appeal was heard on the 5th of July, 1820, when the House by its order declared that, under the circumstances of the case, they could not proceed to pronounce any decision on the appeal, inasmuch as, although by the decree of the 10th May, 1819, which had not been appealed from by any of the parties, it was declared as between the Appellant, Richard Franklin Gough, and the Defendants, the Respondents, and John Latouche, deceased, that the Appellant, R. F. Gough, as executor of Thomas Gough, was entitled to the benefit of the proceedings mentioned in the suit instituted by him, as prayed by his bill; yet such decree had declared no right of J. Franklin as his co-executor, and by such decree the bill of the Ap-

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* See *Rylands v. Latouche*, anté vol. ii. p. 566, 1st series.

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pellant, R. F. Gough, had been dismissed as between the Appellant, R. F. Gough, claiming as devisee of Thomas Gough, and the Respondents and J. Latouche, deceased; and that the bill had also, by the same decree, been dismissed as against John Massey, so that there was no person before the House in whom the property of the Appellant, R. F. Gough, was vested, in consequence of his discharge under the insolvent act, and inasmuch as the decree of the 28th of June, 1806, was and could only have been obtained by Maria Rylands, J. Hamilton, and W. Crawford, as devisees as well as executors of T. Gough; and the subsequent decree of the 27th June, 1808, was founded upon the supposed rights of Maria Rylands, John Hamilton, and W. Crawford, as devisees as well as executors of Thomas Gough, the House could not proceed to determine the merits of the appeal without having before them the Appellant, R. F. Gough, in the character of devisee in the will of T. Gough; and also, without having before it such person as might be entitled as assignee of the estate of the Appellant, R. F. Gough, under the insolvent act, especially as it appeared on the face of the proceeding before the House, that the decree of the 28th June, 1806, on which the order and decree appealed from were founded, was obtained by persons who had no right to the estate in question; and in consequence of a private agreement between them and the Appellant, R. F. Gough, to which the Defendants in the cause did not appear to have been parties or privies, and which agreement did not appear to have been disclosed to the Court at the time of such decree, or during the subsequent

proceedings, and therefore might be deemed to have been a fraud on the Court, and on the other parties to the suit, and that it might be objected on the hearing of the appeal, that the said decree of 28th June, 1806, and the subsequent proceedings thereon, were absolutely void, or were void so far as the same respected the leasehold estate. It was therefore ordered on the 24th of July, 1820, that the hearing of the appeal should stand over, with liberty for the several parties interested to take such proceedings as they might be advised in the Court of Chancery in Ireland, respecting the suit instituted by Thomas Gough, and the suit instituted by Maria Rylands, John Hamilton, and William Crawford, and the suit instituted by the Appellant, Richard Franklin Gough, and to bring before the House parties competent to litigate the questions which might thereon arise between the Appellants and Repondents, and the right of the Appellants to prosecute the appeal.

Subsequently to the date of this order, George Latouche died.

On the 2d of November, 1824, the Appellants filed their bill against the Respondents, stating, amongst other things, the original bill filed by Thomas Gough, and the several other matters hereinbefore mentioned, and setting forth in particular detail the several proceedings, reports, and orders made in the suit instituted by the devisees and executors under the first will of Thomas Gough; and stating that the Appellant, John Franklin, was then the assignee under the original insolvency of the Appellant, R. F. Gough, and also under his subsequent insolvency in 1821; and charging that John Latouche, David Latouche, and

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Peter Latouche the elder, the Defendants in the revived suit of Hamilton and Crawford, were well aware of the second will having been made in favor of the Appellant, R. F. Gough, and that he insisted on the validity thereof; and were also well aware of the nature of the articles entered into in the year 1805, between the Appellant, R. F. Gough, and Hamilton and Crawford. And charging that the fact of the articles in no manner affected the rights of the Defendants, Latouche's, inasmuch as it availed them nothing which way the question turned in respect of the establishment of either of the wills, or which of the contending parties in respect thereto prevailed, and therefore with the knowledge of the second will and articles, concurred and acquiesced in the proceedings in the original cause, at the suit of the trustees and executors of the first will, well knowing of the second will, and that the Appellant, R. F. Gough, was proceeding to establish the same: And the bill prayed that the decrees of 28th June, 1806, and 20th April, 1807; the report of 23d December, 1807, exception thereto, rules made thereon; the second report of 23d May, 1808, exceptions taken thereto, and rules made thereon; and the final decree of the 27th June, 1808, might be made and taken in the name and favor of the Plaintiffs, as executors of T. Gough, so far as respected his personal estate, and in favor of the Plaintiff, John Franklin, as assignee of the Plaintiff, R. F. Gough, which R. F. Gough was devisee and one of the executors of T. Gough, *pro forma*, so that the several proceedings in the said suits might be revived and rectified, and the Plaintiffs be decreed the benefit thereof, and the same

be put in such plight and condition as to enable the Plaintiffs to sustain the appeal from the orders and decrees therein before mentioned, and to meet the view and intention of the House of Lords in retaining the appeal.

The Respondents, by their answers, denied notice of the agreement or the will, until after the decree of 1818: stated their belief that the agreement was private and fraudulently concealed, and objected to the relief, on the grounds of defect of parties, and want of privity between the Plaintiffs in the original and supplemental suits, who claimed under different titles.

The Appellants replied to the answers, and issue having been joined, they went into evidence, but failed to prove the statement in their bill with regard to David Latouche, and Peter Latouche the elder, having had notice of the second will of Thomas Gough, or of the agreement of the 28th of August, 1805, during the proceedings had subsequent to such agreement.

The cause was heard, on pleadings and proofs, on the 24th and 25th of June, 1825, and by the decree, dated on the latter of those days, it was ordered and decreed, that the Appellant's bill should be dismissed without costs.

Against this decree the appeal was presented, and Peter Latouche the elder having died after the appeal was lodged, the appeal was revived against his executors, the Respondents, John David Latouche and Peter Latouche.

The case was heard in 1830, when *Mr. Horne* and *Mr. Tinney* argued for the Appellants, and *Sir Geo. Grey* claimed a right to be heard for the

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Respondents, Henrietta Gough and Maria Rylands; but the House being of opinion that the interest of those Respondents was the same as that of the Appellants, decided, according to the practice of the House, that he should not be heard.

The Solicitor General, (Sir Edw. Sugden) on behalf of the Defendants, Latouche's, then proceeded to observe, that the argument of the Appellants' counsel supposed that the Court below had no jurisdiction to dismiss the bill, but only to see that the suit was made perfect, and that the order of the House in 1820 was directory for this purpose. He then entered into a statement of the proceedings on the former appeal, towards the conclusion of which statement, the *Lord Chancellor* interposed, by asking what there was in the case to shew that the Respondents, Latouche's, or those whom they represented, knew of, or acquiesced in, the agreement; and observed that the order of the House in 1820, gave leave to the parties to take such proceedings as they should be advised, to make the suit perfect: that they had made the experiment, and failed: that the order could not have the effect of restricting the jurisdiction of the Court below, so as to deprive them of the power of dismissing a bill in which the allegations were not supported by evidence: and concluded by stating his opinion that the bill was properly dismissed.

Mr. Horne then claimed a right to be heard in reply; but the *Lord Chancellor* observed, that there had been no argument, but only a statement by the Solicitor General, which coincided with his (the Lord Chancellor's) view of the case.

Whereupon *Mr. Horne* urged that it was therefore the more necessary that he should be heard in reply. But his claim was not admitted; and upon the motion of the Lord Chancellor, an order was made dismissing the appeal, without costs, the Lord Chancellor observing that costs would be useless to the Respondent, as the Appellant was an insolvent.

Judgment affirmed.

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IRELAND.

(COURT OF EXCHEQUER.)

GEORGE VESEY - - - - - *Appellant.*JOHN BODKIN - - - - - *Respondent.*

B. the assignee of certain leases of lands in Ireland, for long terms of years, being in arrear for rent, suffered judgment to be recovered on ejectment by the lessor, and possession of the lands was delivered by writs of *habere* on the 18th of July, 1823. By the Irish statute 4 Geo. I. c. 5, s. 3, a Court of Equity is empowered to annul the proceedings in ejectment, and restore the possession to the lessee, if a bill is filed, and the amount of rent and costs paid into Court, within six calendar months after execution has been executed in the ejectment. On the 17th of January, 1824, B. filed a bill in the Exchequer to redeem the lands, and obtained an order, dated on the 17th of January, and signed by one of the Barons of the Exchequer, to lodge the amount of rent in arrear and costs in the Bank of Ireland. The order was left with the Accountant General on the 17th, after the Bank was shut. On Monday, the 19th of January, the money was paid into the Bank, and the Accountant General gave a certificate accordingly. A treaty for a compromise then took place, and was for some time pending.

On the 7th of May, 1825, on the motion of B., it was ordered that the order for lodging the rent and costs should be entered as of the 17th of January, and that the lodgement of the money should be receipted on that day instead of the 19th, and that a certificate should be granted accordingly by the Accountant General.

On the 7th of July, 1825, the lessor obtained an order to take out of Court, without prejudice to the rights of the parties, the rent and costs which had been deposited, and that he might be at liberty to proceed in the recovery of the lands.

Having under this order taken the money out of Court, the Lessor appealed against the order directing the alteration in the date of the payment of the rent and costs. The order was reversed.

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THE original bill of complaint in this cause was filed by the Respondent against the Appellant, on the 17th of January, 1824, and stated that, by a certain indenture of lease, bearing date the 3d of August, 1781, Ann Echlin and Alice Echlin demised the lands of Lenamore, Clonskeen, and Drinane, in the county of Galway, to Henry Hinde for a term of sixty-one years, at a yearly rent of 100*l.* payable half-yearly, and that the said Henry Hinde, by indenture, assigned the said premises to John Bodkin, Esquire, now deceased, the father of the Respondent; and the said bill further stated that the said Alice and Ann Echlin, by indenture bearing date the 30th of May, 1791, demised to the said John Bodkin, deceased, that part of the lands of Castletown, otherwise Tullynadaly, and part of Liavally, in the said county of Galway, and also the fairs and markets usually holden in and upon the said lands of Castletown, otherwise Tullynadaly, and part of Liavally, for a term of sixty-one years, at the yearly rent of 45*l.* payable half-yearly, and that, by another indenture bearing date the said 30th of May, 1791, the said Alice and Ann demised unto the said John Bodkin, deceased, other part of the lands of Castletown, otherwise Tullynadaly, and that part of the lands of Liavally in the possession of the said John Bodkin, containing 258 acres, for a term of sixty-one years, at the yearly rent of 260*l.* payable half-yearly.

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That the said John Bodkin, deceased, died in the year 1803, and by his will appointed the Respondent executor thereof, and that the Respondent had been, since the death of the said John Bodkin, in the possession of the said several premises, and was entitled to the benefit of the said several leases.

That the said Alice and Ann Echlin were both dead, and that the interest which they had in the premises so demised became vested in the Appellant, who had received from the Respondent the rent reserved by the said leases. That, there being an arrear of one year's rent due, the Appellant, in the year 1822, brought three ejectments under the statute to recover the premises, and that, by virtue of consents, the Appellant obtained judgments and issued executions, and got possession, and that the Appellant alleged he had made leases of the premises, subject to the Respondent's right to redeem.

That the amount of the rent in arrear was 45*l.* and the costs alleged to have been incurred by the Appellant in the several ejectments amounted to 72*l.* 8*s.*, making together 527*l.* 8*s.*; and that the Respondent was ready and had offered to pay the rent and the costs, and had lodged the said sum in Court to the credit of the said cause; that six months had not elapsed since the writs of *habere* had issued, and therefore the Respondent submitted he was entitled to redeem the premises; that he had applied to the Appellant to deliver up the possession of the premises, which he refused to do, and insisted on his right to hold the premises discharged from the leases. The Respondent, by his bill, prayed that, if the Appellant

alleged that more rent was due than the sum before mentioned, an account might be taken of what was due for rent and costs, and that the Respondent might be deemed entitled to redeem the land upon payment of the sum ascertained to be due, and the costs, which the Respondent thereby offered to do, and might be deemed entitled to hold the said premises under the said leases, notwithstanding the said ejectments, and that such accounts as the Court should think proper might be directed to be taken, and the Appellant charged with what he made, or without wilful default might have made, out of the said premises since the execution of the said writs of *habere*, and that the Respondent might be restored to the possession of the premises, and might have such further and other relief as the case might require.

The Respondent's bill was filed on the 17th of January, 1824, about the hour of twelve o'clock at noon, and a certificate of the filing was then granted by the proper officer, but none of the Barons being in Dublin, application was made to Mr. Baron Smith, at his country house, a distance of about four miles from town, and he granted an order, dated the 17th of January, to lodge the 527*l.* 8*s.* rents and costs in the Bank of Ireland, to the account of the Accountant-General in the cause.

The order was left with the Accountant-General on the 17th of January, 1824, between the hours of four and five o'clock in the afternoon; but in consequence of the Bank of Ireland having closed at three o'clock on that day, and it being Saturday, the Accountant-General kept the order until

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Monday the 19th, when the money was paid in, and he granted the following certificate:—" John " Bodkin v. George Vesey, 19th of January, " 1824. I hereby certify, that pursuant to an " Order, dated the 17th of January, 1824, John " Bodkin, Esquire, has paid into the Bank of Ire- " land the sum of 527*l.* 8*s.* which is placed to my " account in the above cause, as appears by the " receipt of Thomas Talbot, dated this 19th of " January, 1824, hereunto annexed. Signed John " O'Neill, 527*l.* 8*s.*"

Shortly after the bill was filed, the Appellant was served with process to appear and answer the same, but the Appellant, on the 14th of February, 1824, caused a notice, entitled in the cause, to be served on the Respondent's attorney, by which, after stating that, although the Respondent had not performed the requisites prescribed by the statute in cases of non-payment of rent, yet that he (the Appellant) had no object but to be paid his rent and costs; and that inasmuch as he (the Appellant) had not taken the actual possession, but made a six months' lease of part of the evicted premises to the Respondent, and of the residue thereof to his under tenants in possession of the premises, and had not interfered with the rent of the premises, so as to render any account in the cause wholly unnecessary, he (the Appellant) thereby gave the Respondent notice, that on his (the Respondent's) paying to the Appellant the rent and arrears ascertained to be due at the time of the service of the summons of ejectment, and the costs thereof, and also the rent which had subsequently accrued due to the 1st of November then last, and the costs which he

(the Appellant) had necessarily incurred by the Respondent's original bill, he would give the Respondent receipts for the said rent under the said leases to that day.

On the 21st of February, a notice, also entitled in the cause, was given to the Appellant by the Respondent, who proposed to consent to the Appellant's receiving the sum lodged by the Respondent, on getting a receipt for the rent and costs, as if a decree of redemption had been pronounced.

The Appellant, on the 10th of June, 1824, filed his answer to the Respondent's bill, whereby, admitting the introductory matters and the facts, he said he was informed and believed that the Respondent had not lodged the rent and costs in Court to the credit of the cause when the bill was filed, or until the 19th of January, which was after the expiration of six months, and that he and his attorney were in Dublin on the 17th and 18th of January, but that no tender or offer was made to either of them of the rent and costs; but he submitted, that since the six months had elapsed previous to the lodging of the rent and costs, he was not bound to accept the same, or to restore possession, or that the Respondent was not entitled to redeem; and he insisted on his right to hold such lands, discharged of such leases; and he insisted that the rent due to him on the 1st of May, 1824, amount together to the sum of 955*l.*, exclusive of his costs.

The Respondent amended his bill on the 15th of February, 1825, whereby, in addition to the statements contained in the original bill, and by way of amendment, the Respondent stated and

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charged that the Appellant had, on the 14th of February, caused the notice of that date to be served on the Respondent, or his agent: And that the Appellant by the offer contained in such notice had waived any legal advantage he might otherwise have had: And that prior to the service of the notice of the 14th of February, and the 21st of January, 1825, the driver of the Appellant had distrained and taken away the stock of the tenants, and had sold part of such stock: That the Appellant, his agent and driver, had received more than he admitted by his answer to have received; that there was more rent and arrears due to him at that time, than would pay the Appellant twice as much as he claimed; and that the Respondent's tenants would not pay him rent in consequence of the interference of the Appellant and his agents, who encouraged the tenants, and told them that if they did not pay, the Respondent would be evicted, and on such eviction, the tenants should have new leases at lower rents. The bill further stated the compromise which had been set on foot; that the writs of *habere* were not executed on the 18th or 19th of July, and were not returned; that the Appellant, shortly after the execution of the writs, executed leases to some of the Respondent's tenants for six months, on the expiration of which, the Appellant brought separate ejectments, notwithstanding the pendency of the suit to redeem; and that the Appellant threatened to proceed at law against the Respondent and his tenants to get possession, although the merits of the case in the Court of Exchequer remained undetermined; and that the lodging of the money was in due time.

The bill prayed that the Respondent might have the relief prayed by the original bill; and that an account might be taken of what the Appellant had received, or might have received without his wilful default, from the premises; and that the Respondent might be restored to the possession of the premises; and that the Appellant might be restrained from proceeding in the ejectments which he had brought since the filing the original bill.

On the 2d of March, 1825, the Appellant put in his answer, in which he admitted the notice of the 14th of February, 1824; that he caused the notice to be served, being willing to put an end to the litigation, and not with any intent of waiving his rights if the terms were not complied with; he insisted that he was not now bound or precluded from relying on the statute.

The Appellant further admitted the notice of the 21st of February, served by the Respondent's attorney, in reply to the notice of the 14th of February, offering to allow the Appellant to draw out the sum of 527*l.* 8*s.* on the terms contained in such notice; but the Appellant alleged that he did not consider himself bound thereby.

The Appellant, by his answer, denied that any compromise had been set on foot through the interference of any friend, but he said that Ulick Jennings called on him, and talked about settling the differences between the Appellant and Respondent, and some offers were made to let the Appellant have the lands at Castletown for the money due, to which the Appellant replied, that if he was entitled thereto he would get them, as proceedings had been taken, and he would leave it to

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the Court to decide; and he said he was not aware of any correspondence by letter having passed,' and he said he believed that the writs of *habere* had been executed on the 18th of July, and he admitted that they had not been filed, but were in the possession of his attorney; he denied that he or his agent procured the writs to be ante-dated, and he said that possession had been taken before the 18th of July, and he said that he did not in any manner interfere with the sheriff or under-sheriff; he admitted that he had caused such ejectments to be brought against the tenants, notwithstanding the pendency of the suit; he insisted that the Respondent's interest in the land had been forfeited for the reasons mentioned in his former answer; that if due diligence had been used, the money might have been lodged on the 17th of January, and he insisted that his rights were not waived by the notice he had given, and especially as the Respondent had not complied therewith.

On the 7th of May, 1825, upon the motion of the Respondent, it was ordered that the order for the lodging the money on account of the rent and costs be entered as of the 17th of January, 1824, and that the lodgement be receipted to the credit of the cause on that day instead of the 19th of January, 1824, and that the Accountant-General should grant a certificate accordingly, without prejudice to any other equity which the Respondent might insist on at the hearing of the cause.

In pursuance of this order, the Accountant-General gave a receipt, whereby he certified that the Respondent paid into the Bank of Ireland, on the 17th of January, 1824, the sum of 527*l.* 8*s.*,

which was then remaining in the Bank to the credit of the cause.

On the 2d of July, 1825, the Appellant gave a notice of motion, to be made before the Lord Chief Baron, in his chambers, for an order for the Appellant to draw the said sum of 527*l.* 8*s.* and that he might be at liberty to execute six writs of *habere* against the land on the six months' demises.

The motion was made accordingly, and upon debate of the whole matter, and hearing counsel, the Lord Chief Baron, by an order bearing date the 6th of July, 1825, ordered that the Accountant-General should draw on the Bank of Ireland in favor of the Appellant, or his attorney, for the sum of 527*l.* 8*s.* lodged there to the credit of the cause, without prejudice to the rights of the parties, and the Appellant was to be at liberty to renew and execute renewals of the writs on the six months' demises, and the execution thereof was stayed.

The Appellant accordingly executed the writs immediately after the order was made, and took possession of the land, and he also drew out the sum of 527*l.* 8*s.*

In December, 1826, a motion was made by the Appellant to rescind the order of the 7th of May, 1825, so far as the same directed the alteration to be made in the date of the receipt from the 19th to the 17th of January, 1824, and as directed the Accountant-General to give a receipt accordingly, which motion was refused.

In January, 1828, the appeal to the House of Lords against the order of the 7th of May, 1825, was presented.

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For the Appellant—*The Solicitor-General* and *Mr. Beames*.

The lease in question was within the description in the Irish statute 4 Geo. I. c. 5, s. 3, which provides that if the lessee shall permit judgment to be recovered in ejectment, and execution to be executed thereon, without paying on demand the rent ascertained to be in arrear, with costs; or depositing the same in a Court of Equity, on filing a bill within six months after execution executed, the lessee shall be barred from all relief in law or equity, and the landlord shall hold the premises discharged from the lease.

In this case the bill was not filed until the last day of the six months, at twelve o'clock. The application to the Accountant-General was not made until between four or five o'clock, and it is not sworn in the affidavits on behalf of the applicant that the money was then ready. On the contrary, the attorney for the Appellant swore that he had heard and believed that the amount of rent and costs was not forthcoming on the 17th.

The taking of the money out of Court, was no waiver, because it was ordered without prejudice to the rights of the parties, and the landlord would in all events be entitled to the money: and if there had been no special reservation, according to general practice an appeal is not barred by consent to an order under the decree.*

If this is a case for equitable relief, it must be upon the ground of accident. But this is more like *laches* than accident: and Courts of Equity do not relieve against every species of accident, or under any circumstances: In the cases of

* *Wood v. Griffith*, 19 Ves. 550.

death, and destruction by fire, relief against specific performance has been refused : * especially if there has been a want of good faith, or reasonable diligence.†

The order is nothing less than a legislative order repealing the statute, which can only be satisfied by a literal compliance with its enactments, as to the payment of the money.

In this case the Accountant-General has been ordered by the Court to certify contrary to the fact, that the money paid on the 19th was paid on the 17th of January : This is not the administration of an equity, but the assumption of a dispensing power. The Court might with as much reason direct that a parol agreement should be put into writing to meet the statute of frauds. In former cases the relief has been given upon circumstances which raised the equity. The Court has never before created the circumstances as a ground for the equity.

It is absolutely necessary that the order of the 7th of May, and the certificate, should be removed out of the way of the Appellant, otherwise there cannot be a proper trial of the true question at the hearing ; for upon the record as it stands, it must be taken that the payment was on the 17th.

The Court had no power to relieve the party, and if they had, there was no case of equity. There is no proof that the money was ready to be paid on the day. The case is similar to the question upon renewals, where a lessee has not com-

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* 17 Ves. 241. *Mortimer v. Capper*, 1 Bro. C. C. 156. *Jackson v. Leven*, 3 Bro. C. C. 605. *Paine v. Mellor*, 6 Ves. 349.

† *Smith v. Clay*, 3 B. C. C. 639, n.

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plied with the conditions of relief prescribed by the statute.*

For the Respondent.—*Mr. Horne and Mr. Roupell.*

The non-payment by the Respondent into Court until the 19th of January, 1824, of the sum of 527*l.* 8*s.* on account of the rent and costs, by virtue of the order made on the 17th of that month, was not owing to the neglect or default of the Respondent, and the actual payment on the 19th was the earliest that could be made, and was therefore not only a regular and *bonâ fide* payment under the order, but was also, under all the circumstances, a substantial compliance with the requisites of the statutes made in that behalf.

The Appellant has not only acquiesced in the order of the 7th of May, 1825, for a great length of time, but he has acted upon and taken the benefit of it, and he cannot now be heard to complain of it, inasmuch as the Appellant has applied for and obtained an order for payment to him of the said sum of 527*l.* 8*s.* which is entered in the Accountant-General's books as having been paid in on the 17th of January, and is receipted by him accordingly, and the order obtained by the Appellant for payment of the money to him is grounded on the certificate and receipt of the Accountant-General of the money having been paid into the Bank of Ireland on the 17th of January, 1824, which are recited in the order.

If the Appellant could have been originally entitled to make the objection he now insists on by his appeal, yet he has, by his subsequent acts and

* 1 Vern. and Scriv. 1.

conduct waived his right to object to the non-payment of the money. The money was paid into Court to save the forfeiture, and for that purpose only. The forfeiture accrues on account of the non-payment of the money. The landlord cannot have a right both to the money and the benefit of the forfeiture.

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At the conclusion of the argument, *Lord Wynford* observed, that the order as it stood was conclusive of the whole case: that it was doubtful, upon the affidavits, whether the money was ready on the 17th: that the matter demanded farther inquiry: that a reversal of the order would not prejudice the Respondent, if he could prove at the hearing that the money was ready to be paid on the 17th: and that the Court might think proper to direct an issue to ascertain that fact.

The Lord Chancellor observed that, in his opinion, the Court below was not justified on the affidavits in making the order.

Order reversed.

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IRELAND.

(COURT OF CHANCERY.)

SIR ARTHUR CHICHESTER, Baronet. *Appellant.*CHARLES M'INTIRE, Esquire - - *Respondent.*

M. being possessed of a house and lands for a term of years under a lease, by the covenants of which he was bound to keep and deliver up the premises in repair, at the expiration of the term, entered into an agreement with C., who had acquired the reversion in the premises, subject to the term, that C. should grant to him a new lease; and thereupon an agreement between M. and C. was executed, whereby C. agreed to grant to M. a lease of the premises for a term of forty-seven years, at such yearly rent as should be put upon the same by two chosen arbitrators, and in case of difference between them, that an umpire should be named by them, and the rent fixed by a majority of the three.

The arbitrators having differed, an umpire was called in, who with the arbitrator for M. the tenant, received evidence to shew that, at the date of the agreement between M. and C., the premises were in a very ruinous state, and that it would require 800*l.* to put them in repair. Upon this view of the case, and assuming as the basis of their award that M. was not bound to repair, and that he had agreed to expend 800*l.* in repairs, they adjudged and awarded that a rent of 60*l. per annum* should be paid by M. to C. during the term of forty-seven years. But the arbitrator for M. the tenant had differed from the umpire, as to the amount of rent, and refused to concur in a larger rent than 43*l.*, until he was prevailed on by the entreaty of M.'s wife to concur with the umpire, in fixing the rent at 60*l.* Held on appeal, reversing the decree in the Court below, that M. was not entitled to a specific performance of the agreement, under the circumstances attending this award.



ON the 31st of December, 1822, a bill was filed by the Respondent in the Court of Chancery in Ireland, stating that the Respondent had been for many years the occupier of a certain messuage, farm, and lands, called the farm and lands of Greencastle, in the county of Donegal, which he held by lease under George Cary, deceased, at the yearly rent of 100*l.* for a term of years which expired on the 1st of November, 1819, and that on the expiration of the said lease, the Respondent made application for a renewal thereof, to the Appellant, who was entitled to make a lease or leases thereof, for such term as therein after mentioned.

The bill then, after stating a treaty between the parties, set forth an agreement, which was reduced into writing, and signed by the Appellant, and by Robert M'Intire on behalf of the Respondent, purporting to be made between the Appellant of the one part, and Robert M'Intire on behalf of the Respondent, of the other part; whereby it was agreed that the Appellant should grant a lease unto the Respondent, "of the quarter land called the Eleven Billiboes, commonly called Greencastle, with the offices, houses and edifices thereon, and the land thereunto belonging, numbered from 1 to 23, inclusive, and containing, by a survey made by Alexander M'Arthur, land surveyor, 87 acres, 2 roods, 21 poles, Cunningham measure, together with a sufficient quantity of turbary, for the consumption of, and to be used on the premises, provided the said Sir Arthur Chichester is entitled so to do, excepting and reserving thereout, Nos. 11,

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“ 12, and 13, containing by the said survey 13
 “ acres, 2 roods, 21 poles, like measure, for the
 “ term of forty-seven years, to commence from
 “ the 1st day of November, 1821, at such yearly
 “ rent as should be put upon the same by John
 “ Staples, on the part of the Appellant, and Wil-
 “ liam Moody on the part of the Respondent; and
 “ in case the said John Staples and William
 “ Moody should not agree in the premises, that
 “ they shall be at liberty to call in a third person,
 “ whose decision, with one of the said arbitrators,
 “ should regulate the rent, which lease, so to be
 “ executed by the Appellant to the Respondent,
 “ was to be conformable to, and contain the
 “ clauses, covenants, reservations, and agreements
 “ hitherto usually granted of the said lands and
 “ premises, by the Marquis of Donegal, under
 “ whom the Appellant holds the same, and also a
 “ covenant to prevent the wilful injury and de-
 “ struction of the old castle on the premises.”
 The parties also covenanted with each other to
 execute a lease and counterpart respectively.

The bill then stated, that John Molesworth
 Staples and William Moody, the two arbitrators,
 not agreeing, appointed Arthur Sampson as an
 umpire, and that Arthur Sampson and William
 Moody, on the 20th of February, 1822, made and
 published their award, by which, after reciting
 the submission and the appointment of the umpire,
 they adjudged the house and farm to be worth
 60*l.* per annum, and awarded that sum to be the
 annual rent at which the same should be held by
 the Respondent, for the term of forty-seven years.

The bill further stated that, in expectation and
 full confidence that a lease would have been made

out and executed to him, of the premises comprised in the agreement, pursuant to the tenor thereof, the Respondent had laid out sundry sums in repairing the dwelling house and offices on the farm, and in improving and fencing the farm, to a considerable amount; and that notwithstanding the said expenditure, the dwelling house on the lands of Greencastle was in a great state of dilapidation and ruin, and almost untenable; and that the Respondent on obtaining the lease, pursuant to the agreement, was ready to expend a large sum of money in rebuilding the dwelling house; that the Respondent caused a draft of a lease to be drawn, pursuant to the terms of the agreement and award, and sent the same to the Appellant for his perusal and approbation; but that the Appellant refused to accept or peruse the same.

The bill then stated, that a sum of 260*l.* having become due from the Respondent to the Appellant, for rent of the premises, up to the 1st day of November, 1822, that sum being all the rent and arrears of rent due for the premises, was sent by the Respondent to the Appellant, accompanied by a note, dated the 22d of November, 1822, requiring the Appellant to approve of the draft, or specify his objections, and offering to procure the engrossment of a lease and counterpart.

The bill charged amongst other things, that the Appellant received the copy of the notice, and the draft of the lease, but did not give any answer to the notice, or return the draft; and it prayed that the Appellant might be decreed to execute to the Respondent a lease of the premises comprised in the agreement, pursuant to the tenor

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thereof, and of the award, for the remainder of the term of forty-seven years, the Respondent thereby offering to have such lease engrossed at his expence, and to execute a counterpart of such lease, and to do every thing in the said agreement contained, on his part to be done and performed.

The Appellant by his answer said, that the Respondent had been tenant in possession of the messuage, farm, and lands of Greencastle, under a demise for a term which expired in November, 1819, and that at the expiration of the said term, the Respondent was bound to deliver the said messuage, farm, and lands, with the houses, offices, and edifices thereon, unto the Appellant, in good and sufficient tenantable repair and condition: that the Respondent had suffered the same to be not only greatly out of such repair, but that the house, offices, and buildings, from the want of that care and attention, were, at the time of the treaty nearly in a ruinous state, with the sole view, as the Appellant believed, of depreciating the yearly rent or value thereof to the Appellant. The Appellant by his answer further said, that the messuage, farm, lands, houses and premises, are bounded by the Atlantic Ocean, and very convenient for trade, and that a fair value could not be put upon the same, by considering merely the quality of the land, but that all the advantage of situation should be taken into calculation; and also, that when so long a lease as forty-seven years was agreed to be granted, the probable advantages that were likely to arise from the place becoming a harbour for trading vessels, by the building of a pier, should also be kept in view: that the farm of Greencastle, among others, pos-

sessed the following advantages—namely, sea manure in abundance; lime at a very reasonable price; a constant supply of fish at a very cheap rate; the contiguity of the ferry across to Magilligan, in the county of Londonderry; the beauty and convenience of the situation for boating and bathing, and other amusements and recreations: and the Appellant submitted, that in estimating the value of the said lands, all these circumstances ought to be taken into consideration; and that if these advantages were not kept in view, it would be impossible to decide fairly upon an adequate and proper rent; nor would there have been any necessity, as the Appellant believed, to appoint arbitrators to fix or decide upon a yearly rent, unless such points were to be considered, inasmuch as the mere value of the ground, if estimated merely according to its productiveness, could have been ascertained in the usual way in which rents are agreed on between landlord and tenant.

The Appellant by his answer further said, that John M. Staples valued the said premises at 150*l.*, and William Moody valued the same at 43*l.* yearly, a sum smaller than that which had been offered by the Respondent himself, and not half the amount which the Respondent had paid under his former lease: that Arthur Sampson acted upon an erroneous view of the case between the parties, he taking into consideration the dilapidated state of the house, and buildings, and offices, and allowing the Respondent for the expence of rebuilding the same, without considering that the Respondent as tenant, theretofore in possession thereof, was bound to keep the same in good and tenantable

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order, repair, and condition, and so to deliver up the same: that if the Respondent had laid out and expended any sum of money in repairing the said house and offices, he was bound to do so under the terms of his former tenure thereof, and not suffer the same to go so greatly out of repair as he had done; and therefore the Appellant insisted that such expenditure ought not to entitle the Respondent to a compliance on the part of the Appellant, with an award made on such erroneous grounds.

The Appellant further said, that the Respondent had, subsequently to the execution of the agreement pulled down, or caused to be pulled down, part of the old castle, contrary to, and in violation of the express stipulation and covenant contained in the agreement: that the rent awarded to be paid by the Respondent was a gross undervalue for the lands; and as evidence thereof, the Appellant stated that the lands were, in or about the year 1798, demised at the rent of 100*l.* a year, and which rent the Respondent continued to pay until the year 1819, when the said lease expired.

The Appellant by his answer then set forth a letter, addressed by Mr. Sampson to J. M. Staples, in the words and figures following:—

“Sheephill, 23d of February, 1823.

“Dear Sir,

“After mature consideration and consultation
“with my father, before whom I laid your written
“opinion, Mr. Moody’s, and my own valuation
“and observations made on the spot, I feel confident that my award of 60*l.* is a fair rent for the
“house, farm, &c. at Greencastle. Mr. Moody

“ has, after some hesitation, agreed to it, and we
 “ have both signed a document to that effect. I
 “ understand that young M‘Intire thinks the rent
 “ too high; and I doubt not but Sir A. Chichester
 “ and you will think it too low, after the claim
 “ you thought yourself justified in making of 150%.
 “ This is then the reward I am to expect for my
 “ trouble;—it is however all I wish for, as it
 “ proves the justness of my decision. I think it
 “ right to explain to you, and Sir A. Chichester,
 “ the motives upon which I found my estimate in
 “ opposition to your’s, that M‘Intire is able to
 “ pay what he undertakes, and resident on the
 “ premises, which in these times must be consi-
 “ dered as an advantage; that the acreable rent
 “ of a farm to a farmer is not worth more than
 “ 44%.; that the dwelling house, &c. is in so bad a
 “ state, from the all-destroying hand of time, as
 “ to require it to be rebuilt; and Mr. M‘Intire
 “ has agreed to lay out 800%. or 900%. for this pur-
 “ pose, which, at 10%. per cent. for forty-seven
 “ years, will make his rent about your demand
 “ per annum; that the place is now so near the
 “ fort and soldiery, as to render it unfit for
 “ bathing; that the rabbit warren no longer
 “ exists, and that this place is so far from a mar-
 “ ket town, &c. &c. You have much enhanced
 “ the value of Greencastle from its beauty, and
 “ from the comparative estimate with a house and
 “ farm rented by Mr. Dysart; but on considera-
 “ tion you will admit, that the particular fancies
 “ of individuals cannot be admitted as general or
 “ reasonable items in the making up the total of
 “ a real and substantial estimate. In letting the
 “ manor of Walworth, in which there are many

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“ gentlemen’s dwellings, much better situated in
 “ point of beauty and convenience to that of
 “ Greencastle, there was no valuation of such
 “ dwellings but under the head of gentlemen’s
 “ accommodations; thus, for instance, Mayor
 “ Stirling was charged 15*l.* per annum beyond the
 “ acreable rent, for a large house, fine walled gar-
 “ den and orchard for some acres; and again,
 “ where the house was found out of repair, no
 “ valuation was laid on it, or extra on the gardens;
 “ but, on the contrary, 500*l.* was offered to Mr.
 “ Beresford, to enable him to put it in repair; and
 “ yet in both cases the tenants were discontented.
 “ If your friend had hoped to avail himself of
 “ particular fancies, for the enhancement of the
 “ premises now in question, his best mode would
 “ have been to have advertised the place, and
 “ received various proposals; but when he con-
 “ sented to the arbitration of merely calculating
 “ valutors, he necessarily precluded himself from
 “ any advantage arising out of capricious imagi-
 “ nary valuations. My father desires his respects,
 “ and me to say that he will be happy to see you
 “ when you come this way; and I shall be obliged
 “ by your informing me if you and Sir Arthur
 “ think I have done you justice. I have the
 “ honour to be, dear Sir, respectfully your’s,

“ ARTHUR SAMPSON.”

“ The Rev. J. M. Staples, Menville.”

The Appellant submitted that the principles on which Arthur Sampson had proceeded, as so stated by himself, were erroneous, and manifestly unjust to the Appellant, inasmuch as the Appellant was entitled to have every circumstance taken into consideration, which would enhance the value

of the premises; and inasmuch also as Arthur Sampson had reduced his estimate of the rent, upon the principle that the Respondent was to expend a sum of 800*l.* or 900*l.* on the premises, although such expenditure was rendered necessary by reason of the breach of the covenants in his former lease, and although he was not bound by the agreement, or otherwise, save by the covenants in the expired lease, to expend any sum whatever in buildings.

The Appellant further submitted that, even if the rent had been agreed on originally between the parties, or even if the award were good and valid, the Respondent was not entitled to a specific performance of the agreement, inasmuch as he had, as the Appellant believed, pulled down and destroyed part of the old castle, which the Appellant was so anxious to preserve.

The Respondent entered into evidence, and proved the execution of the agreement and the award; also, that at the date of the agreement of the 15th of December, 1821, the premises were not in good and sufficient tenantable repair; and that the Respondent at that time intended to lay out a considerable sum of money in repairs and improvements. The Respondent also examined Mr. Moody, the arbitrator, who stated that he had viewed the grounds, and the value he put upon some was 44*l.*, and the remainder of the 60*l.* was made up in consequence of the solicitation of Mrs. M'Intire, and on account of the situation of the fort, the witness considering the same a serious injury to the premises; and Mr. Moody further stated, in answer to the 15th interrogatory, that he first knew the lands and premises at Green-castle in 1821; that he was not a judge, or con-

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versant with the value of lands in the neighbourhood of the said premises, that according to the best of his knowledge and belief, the yearly value that he put on the same was 44*l.*; and he would not take a lease of the same on the same terms, to expend the sum that would be requisite to put the house and offices into that repair that it would be necessary for a genteel family to reside in; but he did not value the same by the acre. In his cross-examination he stated, that in making such valuation he took into consideration the dilapidated state of the house and offices, and with a view to the sum that it would be necessary to expend, as witness would not take a lease to be obliged to expend the sum necessary for such repairs, and that he made his award on the principle, that the Respondent would be obliged to expend large sums of money in putting the house and concerns in good and sufficient order and repair, and would have awarded a larger rent, provided the said dwelling house and offices had been in a perfect good state of repair, or thoroughly repaired at the expence of another person.

The Respondent also examined Mr. Arthur Sampson, the umpire, who deposed "that the value " he put upon the said house and premises, and " farm, under all the circumstances, was 60*l.* " annually, considering that the tenure was to be " forty-five years, and that the Respondent was " to lay out on building and repairing, a sum of " about 800*l.* which deponent considered neces- " sary to put the same into thorough repair, as the " residence of a gentleman, and Respondent sta- " ting that he would lay out about that sum." In his cross-examination, Mr. Sampson admitted the

letter of the 23d of February, 1823, set out in the answer, and stated that the grounds and principles on which he made his award were truly and correctly stated in such letter; and that the principle on which he made his award was, that the Respondent would be obliged to spend large sums of money in putting the house and premises in good and sufficient order and repair; and deponent said he would have thought that a larger rent than that which he awarded ought to have been paid for the same, if the same had been in a state of perfect good repair, or if they had been thoroughly repaired at the expence of another person.

The Appellant examined the Rev. John Molesworth Staples, the other arbitrator, as a witness, who stated that he knew the lands and premises in November and December, 1821, and that the houses and other buildings were in bad order and out of repair, and in a dilapidated state at that period; that in his, witness's, judgment, the yearly rent of 150*l.* would be a fair yearly rent for the said farm and premises, if demised in 1821, on a lease for forty-seven years; that if the said house, offices and buildings were put into different repair in 1821, witness considered they would be worth nearly 200*l.* annually, if let on a similar lease; and witness stated, that having undertaken the reference, he and Moody, the other arbitrator, repaired to the premises in the month of November or December, 1821, and in going through the said premises, witness observed to Moody, that it would be better to value the house and offices, and land and garden, which were separated from the remainder of the farm by the road; and Moody

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told witness that he set no value on them, as the improvements which the Respondent was about to make thereon would be an equivalent to any rent which could be set or charged on the same; and that the witness then suggested that it was impossible that he, the witness could agree thereto, and that it would be better to appoint an umpire. This witness also proved the receipt of the letter of the 23d of February, 1823, addressed to him by Mr. Sampson.

The Appellant proved that after 1821, a part of the old castle had been pulled down by the orders and directions of the Respondent.

Much evidence was entered into on both sides as to the value of the farm; but the question before the House did not rest upon that evidence.

An admitted copy of the lease from Mr. Carey, under which the Respondent held the premises up to November, 1819, was produced, and read on the hearing of the cause. This lease bore date the 30th of April, 1798, and was made by George Carey of the one part, and the Respondent, Charles M'Intire of the other part; George Carey thereby demised to the Respondent the lands and premises in the pleadings mentioned:—To hold for the term of twenty-one years from the 1st of November, 1797, at the yearly rent of 100*l.*, and the Respondent covenanted “ that he, his executors, administrators, or assigns, should and “ would at all times during the term, well and “ sufficiently repair, uphold, maintain, and keep “ all and singular the houses, buildings, fences, “ and other improvements already made, or which “ should be made thereafter, upon the demised “ premises, in good substantial order, condition,

“and repair, and the same so well and sufficiently repaired, should and would surrender and yield up at the end or sooner determination of the term.”

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By the decree made on the hearing of the cause, on the 14th of July, 1824, and on a re-hearing,* on the 19th of November, 1824, it was referred to the Master to inquire and report whether, at the time of the agreement in the pleadings mentioned, the Respondent was in his own person bound to repair the premises in the pleadings mentioned or not, and the Court reserved the consideration of all further directions until the return of the Master's report.

Under this decree, the Appellant produced and read before the Master the counterpart of the indenture of lease of the 30th of April, 1798. The Respondent admitted the execution of the lease, but insisted, before the Master, that at the time of the execution thereof, and at the time when the Respondent entered into possession of the premises, the house and buildings demised by the lease were in a ruinous state, that the walls of the houses were made principally of mud, that the offices and out-houses were in a state of ruin and decay, from length of time, the premises having been erected and built long before that time; that all the walls built upon the lands demised were also ruinous and decayed, that the fences upon the demised premises were in bad order, repair, and condition; and further, that he, from time to time, during the continuance of the lease, laid out yearly, and every year, considerable sums of money in repairing, and keeping in repair, and in

* Upon the rehearing, the Appellant supported the decree. See *post* p. 97.

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supporting, upholding and maintaining the premises: And further, that at the expiration of the term, he yielded up the same, and all houses, buildings, farms, and other improvements, which at the time of the making of the indenture were, or during the continuance of the term thereby granted, had been made thereon, and the same continued to be at the time of the making of the agreement in the pleadings mentioned, in better, more substantial order, condition, and repair, than the same were in at the time when the indenture was made, or at the time when he obtained possession of the same, or than the same had been in at any time during the continuance of the term, allowing for the necessary and unavoidable injury and decay arising from the effect of time. The Respondent therefore insisted, that at the time of the agreement in the pleadings mentioned, he was not bound to put the premises into any better state of repair or condition than the same were in as aforesaid, and that he had never, in any instance broken the covenant for repair.

The Respondent applied to the Master, and obtained a certificate for a commission to examine witnesses to prove the above statement, which was carried into the office in the shape of a discharge. The Appellant, treating the fact as immaterial to the matter in issue, did not join in the commission, or take any notice of the proceedings under it. The Respondent therefore examined *ex parte* various witnesses, who proved that in April, 1798, the premises were in a very dilapidated state, that they were also in a very bad state at the expiration of the term, and also in 1821, but not worse than in April, 1798.

The Master made his report on the 16th of

November, 1825, and thereby certified that the Respondent from time to time, during the continuance of the demise, made valuable improvements upon the premises, and that he well and sufficiently repaired and kept the demised premises in good substantial order, condition, and repair, according to the true intent and meaning of the covenant in the indenture of 1798, and the same so well and sufficiently repaired, according to the true intent and meaning thereof, surrendered and yielded up, at the determination of the term, and he found, therefore, that the Respondent was not at the time of the agreement in the pleadings mentioned, in his own person, bound to repair the premises in the pleadings mentioned.

Exceptions were taken to this report by the Appellant, on the following grounds:—

First exception. For that it appeared in evidence before the Master, that the said Charles M'Intire, by indenture of lease, bearing date the 13th of April, 1798, covenanted to repair the premises, and deliver them up in substantial repair at the end of the period; and that at the time of the expiration of the lease, and at the time of the agreement in the decree mentioned, the house and buildings on the demised premises were not in good substantial condition and repair, but on the contrary, the dwelling house and offices were at the time aforesaid ruinous, not in tenantable repair, or fit for habitation; and although no evidence was laid before the Master to show that the covenant was released, or in any way discharged or made void, yet the Master, by his report, finds that the Respondent was not, at the time of the agreement, bound to put the premises into any better state.

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of repair or condition than the same were in at the time.

Second exception. For that the Master, notwithstanding the evidence in the foregoing exception set forth, by report, finds that the Respondent, at the time of the agreement in the pleadings mentioned, had not in any manner broken the covenant for repairs, in the draft report mentioned.

Third exception. For that the Master received evidence of the state of repair in which the dwelling house and offices on the demised premises were at the time of the making of the lease of the 30th of April, 1798, when the Respondent became tenant thereof, which, under the decree in this cause, and the order of reference therein contained, he was not authorized to receive.

Fourth exception. For that the report of the Master is founded on the supposition that, by the agreement, the lessee was not bound to deliver up the buildings and premises in a better state of repair than the same were in at the time of the execution of the lease, even supposing the same to have been out of repair at that time, which is quite contrary to the construction of the covenant.

Fifth exception. For that the Master, by his report, finds that the premises were, at the expiration of the term so demised, in better condition and repair than the same were in at the time when the Respondent entered into possession of the same, or than the same had been in at any time during the continuance of the said lease, although the evidence before the Master did not warrant any such finding.

Sixth exception. For that the Master, by the report, finds that, notwithstanding the covenant,

the Respondent was not at the time of the agreement in the pleadings mentioned, in his own person, bound to repair the premises, although no evidence whatever was laid before the Master, to shew that the covenant had been released or discharged, nor was any evidence given of any fact or circumstance to justify or excuse the non-performance thereof.*

On the 2d day of December, 1825, the cause was reheard on further directions and exceptions to the Master's report, when it was ordered that the exceptions should be overruled, and that the report should stand confirmed, and it was declared that the Respondent was entitled to a specific execution of the agreement of the 5th of December, 1821, and accordingly it was further ordered that the Appellant should execute a lease to the Respondent of the premises comprised in the agreement, for the remainder of the term of forty-seven years, to commence on the 1st of November, 1821, and at the yearly rent of 60*l.* per annum, pursuant to the terms of the agreement and award.

The appeal was against the decrees of the 14th of July, 1824, the 19th of November, 1824, and the 2d of December, 1825.

For the Appellant—*The Solicitor General and Mr. Purvis.*

The arbitrators were misled by the statement of the tenant, that he would lay out 800*l.* There is no stipulation in the agreement that he should

* These exceptions were copies of objections left in the Master's office, to the draft of the Report, and do not exactly apply to the language of the signed report, because it was altered by the Master, after the objections had been left in his office.

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do so. He was not legally bound. The award, therefore, was made under a mistake as to the obligation to repair. The Plaintiff in a suit for specific performance, cannot ask for a variation in the agreement. But the Defendant may avoid performance on the grounds of fraud, surprise, mistake, or misconduct. That the rent was fixed at 60*l.* upon a supposed obligation to lay out 800*l.* in repairs, appears by the evidence, although the Respondent, under the preceding lease, was bound to keep and leave the premises in repair.

The Respondent gave evidence in the cause to shew that the premises were out of repair when he took them in 1798, and they would infer that he was not bound to give them up in better repair, but the contract appears by the covenant.*

The rent was fixed at 60*l.*, not because the arbitrators thought it just, but because the wife of the Respondent intreated them to fix it at that sum. The evidence for the Appellant, shews that the value was much greater. The award is founded in mistake, and the decree proceeds on the award.†

For the Respondent—*Mr. Horne*, and *Mr. Tinney*.

The principle on which the award was made, namely, the yearly value of the premises in the condition which they were in at the time when the lease was to be granted, was the true principle, especially the fact being established, that the

* *Luxmore v. Robson*, 1 B. and A. 584.

† *Clowes v. Dickinson*, 1 V. and B. p.

Respondent was under no obligation to the Appellant to put them into a better condition.

The decree which directed an inquiry for the purpose of ascertaining whether the circumstances of the case justified the arbitrators in assuming the above principle as the basis of their award, was at all events not unjust, as against the Appellant, although the Respondent had grounds of complaint against it.

The Appellant appearing on the re-hearing of the cause, (on which occasion it was competent to him to ask for any alteration of the original decree,) and on that occasion supporting the original decree which was then complained of by the Respondent, and procuring it to be confirmed, with costs of the re-hearing, and proceeding upon it before the Master, cannot now complain of, or appeal against the decree so affirmed. The Master was fully justified by the circumstances of the case, and the evidence before him, in the finding contained in his report. The final decree in this cause was according to the justice of the case, and was of course, as it proceeded on the footing of the former decree, and of the Master's report.

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The Lord Chancellor.—The facts of the case, so far as it is necessary to state them, for the purpose of raising the question on which I shall propose to your Lordships to pronounce judgment, are extremely simple.

22d March,
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It appears that M'Intyre held certain premises in the county of Donegall, as tenant to a person of the name of Carey: the lease was a lease for twenty-two years, and expired in the month of November 1819; he continued afterwards, how-

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ever, in possession until the year 1822. It appears that the property was acquired by Sir Arthur Chichester, the Appellant in this case, from Lord Donegall, and a negociation was entered into after the termination of the first lease, between M'Intire on the one side, and Sir Arthur Chichester on the other, for a new lease, a lease for forty-seven years, to commence from the month of November in the year 1821. It appears that the parties could not at the time come to an arrangement with respect to the rent, but the other provisions of the lease were agreed on, and there was an article drawn up, by which it was agreed that the amount of the rent should be settled by arbitration—an arbitrator to be appointed on each side, and if they did not agree, then an umpire to be appointed, and that umpire, with the concurrence of one of the arbitrators, to settle the rent which was to be paid for this lease of forty-seven years. A great variety of points were raised in the discussion of the case, to which it is not necessary that I should direct your attention, as the judgment I am about to recommend to your Lordships to pronounce, is entirely founded on the award, and the principles on which that award was made.

It appears that the arbitrators met, and disagreed with respect to the amount of the rent, and an umpire was appointed, and that umpire fixed the rent at 60*l.* a year, and a day or two after he had made his award, he wrote a letter to the arbitrator who had disagreed with him, stating the grounds on which he had made that award, and one ground on which, as he stated, he had made his award was, that the premises were out of re-

pair, and that he had made an allowance for that; as the tenant, M'Intire, had agreed to lay out eight or nine hundred pounds in putting the premises into repair, and that he therefore acting upon that agreement on the part of the tenant, M'Intire, had fixed the amount of rent at 60*l* a year. Now, there was no obligation on the part of the tenant, M'Intire, to lay out any such sum of money in repairs. He had entered into no agreement binding upon him for that purpose; if he had laid out only a hundred or a hundred and fifty pounds, or what was necessary for his own immediate occupation of the premises, that was all that he could have been called upon to do, and therefore the ground on which the umpire stated that he had made his award, was a ground not sustainable in point of fact, and it appears to me that therefore the award cannot be carried into effect.

But this is not all—the original arbitrators had differed, and this gentleman, the umpire, was called in in consequence of that difference; he was to fix the rent in concurrence with one of the two arbitrators. The arbitrator on the part of the tenant, M'Intire, had fixed the rent at forty-three pounds a year, and he hesitated whether he should concur with the umpire who proposed fixing the rent at 60*l*. a year; he in fact rejected the judgment of the umpire, and would not agree to concur in that award which he proposed to make; and it then appears, that he went and consulted with Mrs. M'Intire, and that it was in consequence of Mrs. M'Intire requesting that he would agree with the umpire, that he ultimately did so. They had stipulated by the original agreement

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that the award was to be binding only in the event of the umpire and one of the arbitrators concurring, the arbitrator did not in his judgment concur in the award; if left to the exercise of his own judgment he would not have concurred, for he had fixed the rent at 43*l.*, and not at 60*l.*; and then it appears that he took so very improper a course as to leave it to the discretion of the parties interested, who had committed the matter to his discretion, together with that of the umpire. An award made under such circumstances, ought not to be a foundation for that species of equitable relief which was sought in this case, for in this case it is not a proceeding at law upon the award—it is not a proceeding for the purpose of enforcing the award, but it is an application to a Court of Equity to do something beyond what the law would do—to compel a specific performance of a contract for a lease followed up by an award so made.

Under these circumstances, I cannot bring myself to the conclusion that a Court of Equity ought to decree that a lease ought to be granted on the terms stated in this award. Upon the grounds I have shortly stated, I should recommend to your Lordships that the judgment of the Court below should be reversed.

Judgment reversed.

ENGLAND.

(COURT OF CHANCERY.)

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 v.
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JOHN WALPOLE WILLIS, Esq. and }
 LADY MARY ISABELLE, his Wife } *Appellant.*

SIR GEORGE ABERCROMBIE ROBIN-
 SON, and JOSEPH DORIN, the
 Right Honorable THOMAS BOWES
 EARL OF STRATHMORE, and the
 Honourable THOMAS GEORGE
 LYON BOWES, commonly called
 LORD GLAMMIS - - - - } *Respondents.*

Under an order of reference to one of the Masters of the Court of Chancery, B, who proposed to marry C., a ward of the Court, sent in a statement of facts and proposals, in which he stated that, under the will of his grandfather, he was tenant in tail in remainder after the death of his two brothers, without issue, of divers manors, &c. of the value of 10,000*l.* a year; and in the event of his brother G. dying without issue male, or becoming entitled to the said manors, &c. under the will of his grandfather, he B. was entitled under the will of M. B. his grandmother, to a life estate, with remainder to his first and other sons in tail male, in certain manors and lands of the value of 5,000*l.* a year; and thereupon he proposed to settle to the uses of the marriage, a sum of 2,000*l.* sterling, to which he was entitled in possession, and to covenant that in case either of the limitations in his favour, contained in the wills of his grandfather or grandmother, should take effect, he would in twelve months next after coming into possession of the estates thereby devised, convey so much thereof as should be of the clear annual value of 1,500*l.* to trustees, in trust, to pay to C., (the intended wife) in case she should survive him, so much of the rents as with her own fortune would make up a jointure of 2,000*l.* per annum, and to charge the estate so to be conveyed with the payment of 8,000*l.* in addition to the

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fortune provided for younger children, and upon the same ultimate trusts as the 2,000*l.* then proposed to be assigned, and subject thereto, to limit the estate to the first and other sons of the marriage in tail male, &c.

By an indenture of marriage settlement, made upon the basis of these proposals, and under the authority of an order of the Court, B. assigned 2,000*l.* to trustees, upon the trusts specified in the proposals; and then, after covenanting to settle the estates of the wife, if and when they should vest according to the proposals and orders; it was further witnessed that, in pursuance of the order confirming the report on the proposals, and in consideration of the marriage and the settlement of the fortune of the intended wife, B. the intended husband covenanted that "in case at any time during his life he should, "under the limitations contained in the wills of his grandfather and grandmother, or in either of them, *or otherwise*, "become seised or entitled to all or any of the manors, &c. "thereby devised for any *estate of inheritance* in possession, "or otherwise capable of being settled or bound in law or "equity, he would within twelve months after he should become so seised, convey and settle so much of the said manors, " &c. as would be of the yearly value of 1,500*l.*, upon the trusts specified in the proposals and orders." But as to the 8,000*l.* additional portion for younger children, mentioned in the proposals, no notice was taken in the indenture of settlement.

J. the brother of B. upon the death of his grandfather's widow, came into possession as tenant in tail of the lands devised by the will of the grandfather, and suffered a recovery of those lands, declaring the use to himself in fee simple, and upon the death of G., another brother, B. came into possession as tenant for life, under the will of his grandmother, of the lands devised by her will.

Of the marriage between B. and C there was issue a son and a daughter.

Upon a bill filed against B. on behalf of the daughter (an infant) to have the sum of 8,000*l.* raised by sale or mortgage of the interest of B. in the lands devised to him by the will of his grandmother: Held, that the event upon which those lands were charged with the sum of 8,000*l.* had not happened.

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GEORGE Carpenter by his will, bearing date the 9th of November, 1782, devised to Mary Elizabeth Carpenter, his wife, a messuage at Redburn, in the county of Herts, and the lands and appurtenances thereto belonging, then in his own occupation, during her life, and after her decease unto the child which she was then big with, and his or her heirs and assigns for ever. And he bequeathed to his said wife the rents and profits of all such other real estate, and the interest and produce of all such personal estate as he should be entitled to at the time of his decease, until the child which she was then big with, should, if born alive, attain his or her age of twenty-one years, to maintain herself and such child. And in case such child should be born alive, and live to attain the age of twenty-one years, then he gave unto such child, and his or her heirs, executors, and administrators, all such real and personal estate, (chargeable nevertheless with the payment of an annuity of 500*l.* to his wife during her life,) and appointed his wife, and Thomas Baskerfield, executrix and executor of his will, and guardians to the child with which Mary Elizabeth Carpenter was then big.

The testator died soon after the date of his will, leaving his wife ensient with a daughter, Mary Elizabeth Louisa Rodney Carpenter, who was born on the 1st of January, 1783.

Mary Elizabeth Carpenter, the widow of the testator alone proved and acted in the execution of the will, and in the guardianship of Mary Elizabeth Louisa Rodney Carpenter.

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Mary Elizabeth Carpenter afterwards intermarried with Francis Delaval.

Shortly after the marriage, a bill was filed in the Court of Chancery by John Finch and others, against Francis Delaval and Mary Elizabeth, his wife, and Mary Elizabeth Louisa Rodney Carpenter, and others, stating the will of the testator, and his death, and praying accounts of his real and personal estate, and the necessary directions for administering the same under the sanction of the Court.

By a decree made in the cause of *Finch v. Delaval*, bearing date the 26th of April, 1785, it was declared that the will of the testator was well proved; and after directing the usual accounts, the Court ordered that the clear residue of the testator's personal estate should be paid into the Bank of England, and laid out in the purchase of Bank 3l. per cent. annuities, in the name of the Accountant General in trust in the cause: and that the defendants Francis Delaval and Mary Elizabeth, his wife, (who consented thereto) should transfer the several sums of 3,500l. Bank stock, 2,100l. Old South Sea Annuities, and 1,600l. New South Sea Annuities, (parts of the testator's personal estate,) into the name of the Accountant General in trust in the cause, and that the interest to accrue due on the Bank stock, and Old South Sea Annuities, and also on the Bank Annuities, therein before directed to be purchased, should from time to time be paid to the defendant, Mary Elizabeth Delaval, until the defendant Mary Elizabeth Louisa Rodney Carpenter, her daughter, should attain twenty-one, or until the further order of the Court.

The several sums of stock were respectively transferred by Francis Delaval, and Mary Elizabeth his wife, into the name of the Accountant General, pursuant to the directions of the decree.

The Master to whom the cause of *Finch v. Delaval* was referred, made his general report, dated the 6th of July, 1787, and thereby certified (among other things) that he had taken the accounts directed by the decree, and that the defendants, Francis Delaval and Mary Elizabeth his wife, had received of the testator's personal estate only the sum of 624*l.* and that they had expended in the discharge of the testator's funeral expenses and debts, and otherwise on account of his personal estate, the sum of 1,136*l.* 5*s.* 0½*d.*, and that there were no debts or legacies of the testator remaining unpaid; and the Master also found that there was due on mortgage to the testator's estate, the two principal sums of 4,000*l.* and 1,500*l.*

By an order in the cause of *Finch v. Delaval*, bearing date the 24th of December, 1799, made upon the petition of Francis Delaval and Mary his wife, it was ordered that it should be referred to the Master, to consider and certify whether the marriage therein stated to have been proposed between the Respondent, the Earl of Strathmore, then Thomas Bowes, and Mary Elizabeth Louisa Rodney Carpenter, would be a proper marriage; and if the Master should be of that opinion, then any of the parties were to be at liberty to lay proposals before him in respect to a proper settlement to be made upon such marriage.

Under this order a state of facts and proposals was carried into the office of the Master; by

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which, after reciting the will of George Carpenter, and his death, and the decree in the cause, and the Report as before mentioned; it was stated, that the real and personal estates to which Mary Elizabeth Louisa Rodney Carpenter would become entitled, upon the event of her coming of age, consisted of various particulars thereby specified.

The state of facts then proceeded as follows:

“ That the fortune which Thomas Bowes is
 “ now possessed of or entitled to, after payment
 “ of all his present debts and engagements, consists of the following particulars, viz.:—

“ The sum of 3000*l.* sterling, or thereabouts,
 “ charged and secured upon divers freehold or
 “ other estates in England and Scotland, particularly mentioned and referred to by an indenture of four parts, dated the seventh day of
 “ October, one thousand seven hundred and
 “ sixty-six, made between the then Earl of
 “ Strathmore and Kinghorne, of the first part.—
 “ Mary Bowes, widow, and Mary Eleanor Bowes, spinster, of the second part.—Nicholas Lambton, Esq. and the honorable Thomas Lyon, of
 “ the third part.—Thomas Liddell, Esq. and the
 “ right honorable John Lord Gray, of the fourth
 “ part; being the settlement made previous to the
 “ marriage of the then Earl of Strathmore, with
 “ Mary Eleanor Bowes, now Countess of Strathmore, the parents of the said Thomas Bowes.

“ One annuity or clear yearly sum of 600*l.*, for
 “ and during the joint natural lives of the said
 “ Thomas Bowes and of his elder brother the
 “ honorable George Bowes, payable quarterly on
 “ the usual feast days, and the first quarterly

“ payment to begin and be made on such of the
 “ said days as shall next ensue the marriage of
 “ the said Thomas Bowes with the said Mary
 “ Elizabeth Louisa Rodney Carpenter, and which
 “ said annuity was given and granted in prospect
 “ and consideration of the said proposed marriage,
 “ and is secured by the bond of the said
 “ George Bowes, dated the 10th day of July,
 “ 1799, and also by an indenture of even date
 “ with the said bond, whereby the messuages,
 “ lands, tenements, hereditaments, and premises
 “ given and devised by the will of Mary Bowes
 “ to the said George Bowes for his life, (being of
 “ the clear yearly value of 5,000*l.*, and upwards)
 “ are charged with the payment of the said
 “ annuity.

“ That the said Thomas Bowes under and by
 “ virtue of the last will and testament of George
 “ Bowes, Esq. his late grandfather, deceased,
 “ dated the 7th day of February, 1749, *is tenant*
 “ *in tail* in remainder next, after the several
 “ ceases of his said brothers, the present Earl of
 “ Strathmore and the Honorable George Bowes,
 “ without issue male, (both of whom are un-
 “ married) subject to the life interest therein of
 “ his mother Lady Strathmore, of divers manors,
 “ messuages, farms, lands, tenements, heredita-
 “ ments, and premises, of the clear annual value
 “ of 10,000*l.*, and upwards.

“ That the said Thomas Bowes, under and by
 “ virtue of the last will and testament of his
 “ grandmother, the said Mary Bowes, deceased,
 “ dated the 6th day of April, 1777, (in the event
 “ of his said brother, George Bowes, dying with-
 “ out issue male, or becoming entitled to the

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“ estates devised by the said will of his said
“ grandfather,) is *tenant for life*, with remainder
“ to his first and other sons in tail male, of divers
“ other manors, messuages, farms, lands, tene-
“ ments, hereditaments, and premises, of the
“ clear annual value of 5,000*l.* and upwards;
“ (which are the premises charged with the said
“ annuity of 600*l.*) and the said Thomas Bowes
“ will become entitled in manner aforesaid to the
“ last mentioned premises, in case of the death of
“ either of his said brothers without issue male.

“ That the said Thomas Bowes hath not any
“ other estate, real or personal, in possession;
“ reversion, or remainder, except the stock and
“ property upon his rented farm in Herts, some
“ horses kept for his own use, and other chattels,
“ which may be of the value of 500*l.*, or there-
“ abouts, in the whole. That the said Mary
“ Elizabeth Louisa Rodney Carpenter has no
“ relations nearer than the second or third de-
“ gree, excepting her mother.

“ Upon this state of facts, Thomas Bowes pro-
“ poses to assign the sum of 2,000*l.* sterling;
“ parcel of the sum of three thousand pounds,
“ secured by the indenture of settlement of the
“ seventh day of October, one thousand seven
“ hundred and sixty-six) and to settle the same in
“ trust for the benefit of himself for life, after-
“ wards for the benefit of Mary Elizabeth Louisa
“ Rodney Carpenter for life, in case she shall
“ survive him, and after the death of the survivor
“ of them, then for the benefit of all or any of the
“ children of the marriage, in the ordinary course
“ of family settlements: And to covenant that
“ when the said Mary Elizabeth Louisa Rodney

“ Carpenter should attain her age of twenty-one
“ years, he and the said Mary Elizabeth Louisa
“ Rodney Carpenter would join in conveying,
“ assigning, transferring, and settling all her real
“ and personal estates to trustees in trust: As to
“ the real estate, to receive the rents, &c. during
“ the joint lives of Mr. Bowes and Miss Carpen-
“ ter, for her sole and separate use, independent
“ of Mr. Bowes, and so as she cannot alien any
“ but accrued and past rents, &c. : And after her
“ death, upon certain limitations, trusts, and pro-
“ visions therein specified, for the benefit of the
“ husband and children of the marriage: And as to
“ the personal estate in trust to pay the dividends,
“ &c. in like manner as the rents, &c. of the real es-
“ tate are proposed to be; and also in trust to pay
“ 4,000*l.* part thereof, if one younger child, 6,000*l.*
“ if two younger children, and 8,000*l.* if three or
“ more younger children, in addition to Mr.
“ Bowes’s 2,000*l.* before-mentioned, for the use
“ and benefit of such younger child or children, if
“ more than one, in such proportions and manner
“ and at such times as Mr. Bowes and Miss Car-
“ penter, or the survivor of them, shall by deed
“ or will appoint; and in default of such appoint-
“ ment, to the children in equal shares, to sons at
“ twenty-one, and to daughters at that age, or
“ marriage, which shall first happen, with benefit
“ of survivorship, &c. and to stand possessed of
“ the residue, if any, of the personal estate, and
“ the interest, &c. upon the same trusts, &c. as
“ before declared with respect to the real estate
“ and the rents and profits thereof, &c., with
“ powers, provisoes, and agreements, usual in
“ settlements of the like kind.”

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The proposal then proceeded as follows:—

“ Mr. Bowes will further covenant, that in case
 “ either of the limitations in his favour, contained
 “ in the wills of his said grandfather and grand-
 “ mother shall take effect, he will, in twelve
 “ months next after coming into possession of the
 “ estates thereby devised, convey so much
 “ thereof as shall be of the clear annual value of
 “ 1,500*l.* to trustees, in trust, to pay to Miss
 “ Carpenter during her life, in case she shall sur-
 “ vive him, so much and such part of the rents,
 “ as with the rents, dividends, &c. of her own
 “ fortune, will make up to her a clear jointure or
 “ rent charge of 2,000*l.* per annum, and to charge
 “ the estate so to be conveyed with the payment
 “ of 8,000*l.* in addition to the fortune provided
 “ for younger children, and upon the same ulti-
 “ mate trusts as the 2000*l.* now to be assigned
 “ by Bowes: and subject thereto, to limit the
 “ estate to the first and other sons of the mar-
 “ riage in tail male, with remainder to daughters
 “ in tail, as tenants in common, with cross re-
 “ mainders amongst them, with remainder to Mr.
 “ Bowes and his heirs.”

The Master made his report, bearing date the 31st of January, 1800, pursuant to the order of the 24th of December, 1799, and thereby (after setting forth the state of facts and proposal), certified that he had considered the state of facts and proposal, and was of opinion that the proposed marriage was fit to be carried into execution, and that the proposal before stated, for making a settlement on the marriage, was a proper proposal for that purpose. This report was afterwards confirmed, with a variation not material to be stated.

By an order in the cause of *Finch v. Delaval*, dated the 5th of February, 1800, and made upon the petition of Francis Delaval, and Mary Elizabeth his wife, and Mary Elizabeth Louisa Rodney Carpenter, it was ordered, that the report dated the 31st of January, 1800, with the alteration therein directed to be inserted in the settlement to be executed, in pursuance of the said proposals, should be confirmed; and that it should be referred to the Master, to settle and approve of a proper deed or deeds for carrying the proposal mentioned in the report into effect, and for making a settlement on the intended marriage: (The alteration gave a power to charge the estates in settlement with larger sums in favour of the wife, in the various events therein specified as to the birth of the children of the marriage.) And upon the execution of such deed or deeds of settlement, to be settled and approved by the Master, by such parties as he should direct, it was ordered that Thomas Bowes and Mary Elizabeth Louisa Rodney Carpenter, should be at liberty to intermarry.

By an indenture, bearing date the 28th day of February, 1800, and made between Thomas Bowes, therein described as the third and youngest son of John, late Earl of Strathmore and Kinghorne, of the first part; Mary Elizabeth Louisa Rodney Carpenter, therein described as an infant of the age of seventeen years, and a ward of the Court of Chancery, of the second part; Francis Delaval, and Mary Elizabeth his wife, of the third part; and the honorable George Bowes, second son of John, late Earl of Strathmore and Kinghorn, and Thomas Wilkin-

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son, and Ralph Johnson Wall, of the fourth part: After reciting the indentures of the 6th and 7th days of October, 1766, and that the sum of 3,000*l.* and upwards, remained due and owing and secured to Thomas Bowes, under the trusts of a term of 500 years thereby created, being the residue of a sum of 12,500*l.* to which he became entitled under the said indentures: And also reciting the will of George Carpenter, and the decree dated the 26th day of April, 1785; the report dated the 6th day of July, 1787; the order dated the 24th day of December, 1799; the report dated the 31st day of January, 1800; and the order of the 1st day of February, 1802; respectively made in the cause of *Finch v. Delaval*, and reciting that the Master had approved of the indenture: It was witnessed, that in pursuance of the order, and in consideration of the intended marriage, and of the contingent portion, fortune, or estate, of Mary Elizabeth Louisa Rodney Carpenter, and the settlement thereof, Thomas Bowes, with the privity, &c. assigned to George Bowes, Thomas Wilkinson, and Ralph Johnson Wall, their executors, administrators, and assigns, the sum of 2,000*l.* parcel of the sum of 3,000*l.* before mentioned, due and secured to Thomas Bowes, to hold the same unto George Bowes, Thomas Wilkinson, and Ralph Johnson Wall, their executors, administrators, and assigns, upon trust after the solemnization of the said then intended marriage to pay the interest and annual proceeds thereof to Thomas Bowes and his assigns, during his life; and after his decease, &c. (according to the proposals.) And it was also witnessed, that in further pursuance of the order, it was agreed and

declared, and particularly Francis Delaval and Mary Elizabeth his wife, for themselves and on behalf of Mary Elizabeth Louisa Rodney Carpenter, covenanted and agreed, and Mary Elizabeth Louisa Rodney Carpenter, and also Thomas Bowes, for himself, his heirs, executors, and administrators, covenanted with George Bowes, Thomas Wilkinson, and Ralph Johnson Wall, that in case the intended marriage should take effect, and Mary Elizabeth Louisa Rodney Carpenter should live to attain the age of 21 years, they, Thomas Bowes and Mary Elizabeth Louisa Rodney Carpenter, and each of them, and the heirs of Mary Elizabeth Louisa Rodney Carpenter, would at any time or times thereafter, upon the request of George Bowes, Thomas Wilkinson, and Ralph Johnson Wall, or the survivor of them, his executors, administrators, or assigns, convey and assure all and every the messuages, lands, tenements, or hereditaments whatsoever, whereof or whereto Mary Elizabeth Louisa Rodney Carpenter, or Thomas Bowes, in her right should or might, when or at any time after she should have attained her age of 21 years, become seized, possessed, or entitled, of or for any estate of inheritance, in possession, reversion, remainder, or expectancy, or otherwise under the will of the said George Carpenter : To the several uses, and upon the several trusts and for the several ends, intents, and purposes, to which the same ought, in pursuance of and in compliance with the reports, decrees, or orders, therein before-mentioned, or recited to be limited or declared. And it was agreed, that in case the intended marriage should take effect, all such acts,

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deeds, and things, as counsel should advise, should, at the costs of Thomas Bowes, be done as soon as conveniently might be, after Mary Elizabeth Louisa Rodney Carpenter, should have attained twenty-one, for transferring the 350*l.* five per cent. bank annuities, mentioned in the report, unto Thomas Bowes, his executors, administrators, or assigns: And for assigning and vesting the sum of 4,000*l.* and also the other capital sums therein stated to be the particulars of the personal estate to which Mary Elizabeth Louisa Rodney Carpenter would become entitled, in the event of her attaining the age of twenty-one years, unto George Bowes, Thomas Wilkinson, and Ralph Johnson Wall, upon the several trusts, and for the several ends, intents, and purposes, and with, under, and subject to the several powers, provisions, declarations, and agreements which, in pursuance or in compliance with the proposals, reports, orders, and decrees therein before mentioned, ought to be declared, of and concerning the same respectively: And it was further witnessed, that in further pursuance of, and in obedience to the before recited order of the 5th day of February, 1800, and of the proposals therein mentioned, on the part and behalf of the said Thomas Bowes, and in consideration of the said intended marriage, and of the settlement and appropriation therein before made, or covenanted, or agreed to be made, of the contingent estate and fortune of the said Mary Elizabeth Louisa Rodney Carpenter, he the said Thomas Bowes, did thereby further covenant, promise, and agree to and with the said George Bowes, Thomas Wilkinson, and Ralph Johnson Wall, their executors, administrators, and assigns, that in case the said intended

marriage should take effect, and he the said Thomas Bowes, at any time or times during his life, should under or by virtue of the devises or limitations contained in the before mentioned wills of his said late grandfather, George Bowes, and his said late grandmother, Mary Bowes, or in either of them, or otherwise become seized or entitled to all or any of the manors, hereditaments, and estates devised by such wills, or by either of them, or of any other messuages, lands, tenements, or hereditaments, *for any estate of inheritance, in possession or otherwise capable of being settled or bound in equity*, then he the said Thomas Bowes, and all and every other person or persons whose consent or concurrence to that end should be deemed requisite or necessary, should and would at the proper costs and charges of him the said Thomas Bowes, within the space of twelve calendar months next after the said Thomas Bowes, should become so seized or entitled as aforesaid, by such act or acts, deed or deeds, recovery or recoveries, fine or fines, and other conveyances and assurances in the law, as by the said George Bowes, Thomas Wilkinson, and Ralph Johnson Wall, or the survivors or survivor of them, or the heirs or assigns of such survivor, or by their or any of their counsel should be reasonably advised and required, well and sufficiently grant, convey, settle and assure, or cause, or procure to be granted, conveyed, settled, and assured, so much and so many, and such part and parts of the several manors, messuages, lands, tenements, and hereditaments, whereof or whereto he the said Thomas Bowes should become so seized or entitled as aforesaid, as at the time of making such assu-

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rances and settlement as aforesaid, should be of the net yearly value of 1,500*l.*, over and above all taxes, reprises, and deductions whatsoever, or as near thereto as the value of the manors or hereditaments whereof he the said Thomas Bowes should so become seized or entitled as aforesaid, would extend or be sufficient, so and in such manner as that the same hereditaments and premises, to be so of the net yearly value of 1,500*l.*, as aforesaid, with their rights, members, and appurtenances should, from and immediately after the making and completing of such recoveries, deeds, conveyances, or assurances as aforesaid, go, remain, and continue, and should be held and enjoyed to the several uses, upon the several trusts, and to and for the several ends, intents, and purposes, and subject to, with, and under the several powers, provisoes, declarations, and agreements to which the same ought to be limited and settled, in pursuance of, and in compliance with the proposals, reports, orders, and decrees therein before mentioned.

The estates devised by the will of Mary Bowes, consisted of certain freehold and leasehold estates in the city of London, and in the county of Durham, and of certain copyhold and leasehold estates at Paul's Walden, in the county of Hertford, and of a freehold messuage in the borough of Southwark, and of a leasehold estate situate in the parish of St. Paul's, Shadwell, in the county of Middlesex.

Mary Bowes also died possessed of a considerable personal estate.

The state of the family of Thomas Bowes, at the

time of the execution of the settlement of the 28th of February, 1800, was as follows :

Mary Eleanor, Countess of Strathmore, his mother, and tenant for life of the estates comprised in the will of George Bowes, his grandfather, and who in the month of February, 1767, had intermarried with the Right Honourable John Lyon, Earl of Strathmore and Kinghorn, was living.

John Lyon, Earl of Strathmore and Kinghorn, died in the year 1776.

There were issue of the marriage of John Lyon, Earl of Strathmore and Kinghorn, and Mary Eleanor his wife, three sons and two daughters, *viz.* : John Bowes, late Earl of Strathmore and Kinghorn, and Baron Bowes, born 13th April, 1769 ; George Bowes, born 17th November, 1771 ; the Respondents, Thomas Bowes, now Earl of Strathmore and Kinghorn, born 3d May, 1773 ; Maria Jane Bowes, born 21st April, 1768, and Anna Maria Bowes, born 3d June, 1770.

All the said issue were living at the time of the execution of the settlement of February, 1800.

The marriage between Thomas Bowes and Mary Elizabeth Louisa Rodney Carpenter, was effected soon after the date of the settlement of the 28th of February, 1800.

Mary Eleanor, Countess of Strathmore, died on the 28th of April, 1800.

Soon after the decease of Mary Eleanor, Countess of Strathmore, John Bowes, then Earl of Strathmore, her eldest son, (who upon her decease became tenant in tail male, in possession, of the estates devised by the will of George Bowes, the grandfather,) suffered recoveries of those estates,

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and declared the uses thereof to himself in fee simple.

George Bowes, the brother of the Respondent, the Earl of Strathmore, and first tenant for life under the will of Mary Bowes, died on the 31st of December, 1806, without issue, and thereupon the Respondent, the Earl of Strathmore, entered into possession of the freehold, copyhold, and leasehold estates, devised by the will of Mary Bowes, and of the estates purchased pursuant to the trusts of the will.

Mary Elizabeth Louisa Rodney, the wife of the Respondent the Earl of Strathmore, died in the month of May, 1811.

There was issue of the marriage between the Respondent, the Earl of Strathmore, and Mary Elizabeth Louisa Rodney, his late wife, two children, namely, the Respondent, Thomas George Lyon Bowes, Lord Glamis, their eldest child, and the Appellant, Lady Mary Isabelle, now the wife of the Appellant, John Walpole Willis.

On the 14th of August, 1812, a bill was filed in the Court of Chancery, wherein Thomas George Lyon Bowes and Mary Isabelle Bowes, then infants, (by Frederick Walsh, their maternal great uncle and next friend,) were complainants, and the Respondent, Thomas Bowes, Earl of Strathmore, and others, were defendants; stating, (among other things) the wills of Mary Bowes and George Carpenter, and the several proceedings in the cause of *Finch v. Delaval*, hereinbefore stated, and also the settlement of the 28th of February, 1800, and charging (among other things) that the Appellant, Mary Isabelle, as the only younger child of Thomas Bowes by Mary Eliza-

beth Louisa Rodney, his late wife, was entitled under the settlement of the 28th of February, 1800, to have the sum of 8,000*l.* raised immediately by a sale or mortgage of the interest of Thomas Bowes in the estates devised to him by the will of Mary Bowes, and to have the same invested in the public funds, or other good security, upon the trusts thereof aforesaid; that unless the same was raised immediately, the whole thereof was in danger of being lost; and praying (among other things) that Thomas Bowes, and all necessary parties, might be decreed to raise the said sum of 8,000*l.*, according to the covenant of Thomas Bowes, in his marriage articles contained, and to invest the same under the direction of the Court of Chancery upon the trusts contained in the articles respecting the same.

The Respondent, Thomas Bowes, appeared to the bill, and put in his answer, which was filed on the 20th of September, 1816, and thereby (amongst other things,) submitted that the Appellant, Mary Isabelle, was not, for the reasons in his answer mentioned, entitled to have the sum of 8,000*l.* in the last mentioned bill raised immediately by a sale or mortgage of his interest in the estates devised by the will of Mary Bowes, and to have the same invested in the public funds or other good security, upon the trusts in such bill mentioned.

On the 15th of December, 1814, Philip Braham filed his bill of complaint in the Court of Chancery, on behalf of himself and all the other annuitants of Thomas Bowes who should come in and contribute to the expence of that suit, against Thomas Bowes and John Osborn, afterwards Sir

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John Osborn, and John Burt, stating (amongst other things,) the will of Mary Bowes and her death, and stating a certain indenture of the 25th of March, 1809, made between Thomas Bowes of the one part, and Philip Braham of the other part, whereby, in consideration of the sum of 10,000*l.* paid by Philip Braham to Thomas Bowes, he granted to Philip Braham an annuity of 1,307*l.* 10*s.* for the term of one hundred years, if Thomas Bowes should so long live, to be issuing out of, and charged upon part of the estates of which he was in possession under Mary Bowes' will, the legal estate and interest wherein was vested in John Osborn and John Burt, and stating that there was then in arrear of the annuity, the sum of 4,641*l.* 12*s.* 1*d.*; and therefore praying that the indenture of the 25th of March, 1809, might be established and carried into execution by the decree of the Court, and that an account might be taken of the arrears of the annuity then due to Philip Braham; and that for the better securing to the complainant, Philip Braham, the due payment of the annuity, some proper person or persons might be appointed, under the direction of the Court of Chancery, to be receiver or receivers of the rents and profits of the estates and premises comprised in the indenture of the 25th of March, 1809, and that such receiver or receivers when appointed might be directed in the first place, out of the rents and profits of the same estates and premises, to pay to the complainant, Philip Braham, what should be found due to him upon his annuity, and then to pay to the complainant, Philip Braham, the growing quarterly

payments of his annuity as the same should arise and become due.

By an order of the Court of Chancery made in the cause of *Braham v. Bowes*, bearing date the 5th of December, 1814, it was ordered that it should be referred to Samuel Compton Cox, Esq. (one of the Masters of the Court,) to appoint a proper person to be receiver of the rents and profits of the estates in question in the cause of *Braham v. Bowes*, and that the person so to be appointed receiver should from time to time annually pass his accounts before the Master, and should pay the balances reported due from him into the bank, with the privity of the Accountant General, to the credit of the last mentioned cause.

Under the last mentioned order, Mr. John Ilderton Burn was appointed receiver of the rents and profits of the several freehold, copyhold, and leasehold estates in the counties of Middlesex, Durham, and Hertford; and in the city of London, respectively devised by the will of Mary Bowes.

By an order of the Court of Chancery in the cause of *Braham v. Bowes*, dated the 5th of November, 1816, and made on the petition of the receiver, it was ordered that it should be referred to the Master, to inquire and state to the Court whether the several sums of money therein particularly mentioned, including several sums paid on account of the annuity granted to Philip Braham, and the other annuities therein mentioned, were properly paid by the receiver of the rents and profits of the estates in question; and in case they were properly paid, the Master was to allow the same to such receiver in passing his accounts :

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and it was ordered, that the Master should enquire and state to the Court the several priorities of the incumbrances affecting the same estates and premises, and that the receiver should be at liberty to pay the ground landlord any rent that was due or that might thereafter accrue due in respect of the estates and premises; and when the Master should have ascertained who was or were such several incumbrancer or incumbrancers, to the extent or amount of the annual rents and profits of the same several estates, (subject in the first place to the various payments and allowances necessary to be made thereout,) that the Master was to ascertain and certify how and in what manner, and to whom by name and in what proportions, the rents and profits of the several estates in the hands of the receiver, and to be thereafter received from and on account of such estates, ought in future to be paid and applied.

By an order of the Court of Chancery, made in the cause of *Braham v. Bowes*, bearing date the 19th of July, 1819, it was ordered, that Philip Braham should be discharged from further proceeding in the last mentioned suit; and it was ordered, that George Abercrombie Robinson and Joseph Dorin (on behalf of a certain company called the Globe Insurance Company) should be at liberty to prosecute the suit in the place and stead of Philip Braham.

John Bowes, Earl of Strathmore, the eldest brother of the Respondent, Thomas Bowes, Earl of Strathmore, died on the 3d of July, 1821, without issue, and thereupon Thomas Bowes became Earl of Strathmore.

The Master by his report bearing date the 6th

of July, 1821, made in pursuance of the order of the 5th of November, 1816, (among other things,) found, that by an indenture bearing date the 8th of November, 1813, and made between Thomas Bowes, Earl of Strathmore, of the first part, Sir Thomas Theophilus Metcalfe, Bart. since deceased, George Abercrombie Robinson, Joseph Dorin, and Harvey Christian Combe, since deceased, four of the directors of, and trustees for the Globe Insurance Company, of the second part, and James William Freshfield, of the third part: In consideration of the sum of 25,000*l.* paid by Sir Thomas Theophilus Metcalfe, George Abercrombie Robinson, Joseph Dorin, and Harvey Christian Combe, as therein mentioned, Thomas Bowes, Earl of Strathmore, granted to Sir Thomas Theophilus Metcalfe, George Abercrombie Robinson, Joseph Dorin, and Harvey Christian Combe, in trust for the Globe Insurance Company, an annuity of 2,875*l.* to be payable during the term of ninety-nine years, if Thomas Bowes, Earl of Strathmore, should so long live, and to be charged upon all the hereditaments and premises, situate at Paul's Walden, in the county of Herts, and Shadwell, in the county of Middlesex, being respectively parts of the estates devised by the will of Mary Bowes: And the Master also found and stated another indenture bearing even date with the last mentioned indenture, whereby several annuities granted by Thomas Bowes, now Earl of Strathmore, in 1809, were assigned to Joseph Kaye, in trust for better securing the annuity of 2,875*l.*: And the Master certified that he conceived the Globe Insurance Company to have the first in-

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cumbrance on the entirety of the premises at Paul's Walden and Shadwell, to the extent of the annuity of 2,875*l*: And the Master found and stated various other grants of annuities by Thomas Bowes, Earl of Strathmore, charged on the estates at Paul's Walden and Shadwell, and other the estates devised by or subject to the trusts of the will of Mary Bowes; and the Master further certified, that a state of facts and charge had also been laid before him on the part of the Appellant, Lady Mary Isabelle Willis, then Lady Mary Isabelle Bowes, the only younger child of Thomas Bowes, Earl of Strathmore, setting forth the indenture dated the 28th of February, 1800: And the Master found that such indenture of the 28th of February, 1800, was in fact duly made and executed by Thomas Bowes, Earl of Strathmore, but that he had never performed his said covenant, or charged the premises with the sum of 8,000*l*., or any other sum of money; and that a suit was then depending in the Court of Chancery, for the purpose of compelling the Respondent, Thomas Bowes, Earl of Strathmore, to raise the sum of 8,000*l*. out of the premises for the benefit of the Appellant, Lady Mary Isabelle Willis, then Lady Mary Isabelle Bowes, but that no decree had then been made in such suit, and it did not appear to the Master that the indenture of the 28th of February, 1800, had been ever inrolled or registered, and under those circumstances he conceived that the indenture could not be considered as an incumbrance affecting the several premises therein mentioned, or any part thereof, as against the several incumbrances therein mentioned.

On the 30th of July, 1821, George Abercrombie Robinson and Joseph Dorin, preferred their petition to the Court of Chancery, praying that the Master's report, dated the 6th of July, 1821, might be confirmed. On the 13th of August, 1821, the Appellant Lady Mary Isabelle Willis, then Lady Mary Isabelle Bowes, also preferred her petition to the Court, praying that the report of the 6th of July, 1821, might not be confirmed, but that it might be declared that the sum of 8000*l.* was the first charge in priority upon all the estates to which the Respondent Thomas Bowes, became entitled upon the decease of his brother George Bowes, under the will of Mary Bowes, or that it might be referred back to the Master to ascertain and report on the right and interest of the Appellant Lady Mary Isabelle Willis, then Lady Mary Isabelle Bowes, under the settlement, and that all necessary directions might be given for raising the sum of 8,000*l.* out of the bank annuities, standing in the name of the Accountant General, in trust, in the cause of *Braham v. Bowes*, and for carrying the same to a separate account upon the trusts of the settlement of the 28th of February, 1800.

The two petitions came on to be heard before the Vice Chancellor, on the 15th of August, 1821, when it was ordered that the Master's report should be confirmed, except as to the disallowance of the claim of the Appellant Lady Mary Isabelle Willis, and except as to the priority of one of the annuities therein mentioned: And it was ordered that George Abercrombie Robinson and Joseph Dorin (who by virtue of the

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order of the 19th of July, 1819, were at liberty to prosecute the cause in the place of Philip Braham,) should be at liberty either to amend the bill in the cause of *Braham v. Bowes*, or to file a supplemental bill (as they should be advised) making the Appellant Lady Mary Isabelle Willis a party: And it was ordered that so much of 14,200*l.* 14*s.* 2*d.* reduced 3*l.* per cent. bank annuities, then standing in the name of the Accountant General, in trust in the cause of *Braham v. Bowes*, as according to the market prices such annuities then bore would be sufficient to raise the sum of 8,000*l.*, should be carried over in trust in the cause of *Braham v. Bowes*, to an account to be entitled "The Marriage Articles Account," but that was to be without prejudice, and the Accountant General was to declare the trusts thereof accordingly, subject to the further order of the Court: And it was ordered, that the Master should be at liberty to make a separate report or reports of any of the matters thereby referred to him, and to state any special circumstances in regard thereto.

Pursuant to the last mentioned order 10,457*l.* 10*s.* 3*d.* bank 3*l.* per cent. reduced annuities, were carried over by the Accountant General, and at the date of the appeal remained standing in his name in trust, in the cause of *Braham v. Bowes*, "The Marriage Articles Account."

On the 13th of May, 1822, in pursuance of the above mentioned order of the 15th of August, 1821, Lady Mary Isabelle Willis was made a party to the proceedings; and Charles Lyon and Henry Disney Roebuck, who had been appointed

trustees in the place of Sir John Osborn and John Burt, were also made parties thereto.

On the 7th of August, 1823, the Appellant Lady Mary Isabelle Willis attained the age of twenty-one years.

By indenture bearing date the 7th of August, 1824, and made between the Appellant John Walpole Willis, of the first part; the Appellant Lady Mary Isabelle Willis, of the second part; and Henry Disney Roebuck, and Samuel Turner, of the third part; in consideration of a marriage then intended, between the Appellants, John Walpole Willis, and Lady Mary Isabelle, she assigned the said sum of 8,000*l.* unto Henry Disney Roebuck, and Samuel Turner, upon trust, to recover and receive the same, and to stand possessed thereof upon the trusts therein mentioned, for the benefit of John Walpole Willis, and Lady Mary Isabelle his intended wife, and the children of their marriage.

On the 8th of August, 1824, the Appellants intermarried.

On the 3d of December, 1824, George Abercrombie Robinson and Joseph Dorin exhibited their supplemental bill in the Court of Chancery, to make John Walpole Willis, Henry Disney Roebuck, and Samuel Turner, parties to the proceedings in the cause of *Braham v. Bowes*.

The original cause of *Braham v. Bowes*, and the supplemental cause of *Robinson v. the Earl of Strathmore*, came on to be heard before the Vice Chancellor, on the 9th of June, 1825, when it was declared that the complainants Sir George Abercrombie Robinson, and Joseph Dorin, on behalf of themselves and the several other annuity creditors of the defendant Thomas Bowes,

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Earl of Strathmore, included in the report, dated the 6th of July, 1821, were entitled to the benefit of the several proceedings had in the cause of *Braham v. Bowes*, and were entitled to be paid their respective annuities according to the priorities found and established by the report, and the order confirming the same, dated the 15th of August, 1821, but that was to be without prejudice to any question arising upon the claim of the Appellant Lady Mary Isabelle Willis, with respect to the said sum of 8,000*l.*: and it was also declared that Sir George Abercrombie Robinson, and Joseph Dorin, should be at liberty to prosecute and carry on the said causes and proceedings on behalf of themselves, and the several other annuity creditors, against the several defendants, and that it should be referred to the Master to enquire whether the Appellant Lady Mary Isabelle Willis, or the Appellant John Walpole Willis, or the defendants Henry Disney Roebuck, and Samuel Turner, in her right was or were entitled, or had for any and what length of time been entitled to any, and what charge or incumbrance on the several estates in question, in the cause of *Braham v. Bowes*, or on any and which of them; and if the Master should find that the Appellant Lady Mary Isabelle Willis, or the Appellant John Walpole Willis, or the defendants Henry Disney Roebuck, and Samuel Turner in her right were entitled to any such charge or incumbrance, then it was ordered that the Master should enquire whether the same was a prior charge to any, and which of the several annuity incumbrances included in the report of the 6th of July, 1821, and over any and which

of the estates; and that the Master should be at liberty to state any special circumstances. And the consideration of all further directions, and of the costs of the suits was reserved till after the Master should have made his report.

The Master, by his report dated the 27th of May, 1827, after stating the will of George Bowes, the great grandfather of the Appellant Lady Mary Isabelle Willis, and his death; and the marriage of his daughter Mary Eleanor, with John Lyon, Earl of Strathmore; and that they had such issue as in his report mentioned; and stating the death of John Lyon, Earl of Strathmore, in the year 1776; and the will of Mary Bowes, and her death; and the will of George Carpenter, and his death; and the birth of Mary Elizabeth Louisa Rodney Carpenter; and her marriage with Francis Delaval; and the several proceedings in the cause of *Finch v. Delaval*; and the indenture or articles of the 28th of February, 1800; and the marriage of the Respondent Thomas Bowes, Earl of Strathmore, with Mary Elizabeth Louisa Rodney Carpenter; and the issue of such marriage; and the death of Mary Eleanor, Countess of Strathmore; and the recoveries suffered by John Bowes, Earl of Strathmore, her eldest son, certified that he had considered the several wills of George Bowes, the great grandfather, and of Mary Bowes, and the articles of settlement of the 28th of February, 1800, together with the several other matters therein before stated, and it appearing to him that the limitations in remainder, in favour of the defendant Thomas Bowes, Earl of Strathmore, contained in the will of his grandfather, were

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barred by the recoveries suffered by his eldest brother, John, last Earl of Strathmore, and that as far as respected the limitations contained in the will of Mary Bowes, in favour of the defendant Thomas Bowes, Earl of Strathmore, the event on which he covenanted to make the settlement, and under which the Appellant Lady Mary Isabelle Willis, or the Appellant John Walpole Willis, or the defendants, Henry Disney Roebuck, and Samuel Turner, in her right, claimed to have a charge of 8,000*l.*, (that is to say) “ That in “ case he the defendant Thomas Bowes, Earl of “ Strathmore, should become seized or entitled “ to the estates devised by such will of the said “ Mary Bowes for any estate of inheritance in “ possession or otherwise capable of being settled “ or bound in law or equity,” never took place; and therefore it did not appear to him the said Master, that either the Appellant Lady Mary Isabelle Willis, or the Appellant John Walpole Willis, or the defendants, Henry Disney Roebuck, and Samuel Turner, in her right, was or were entitled, or ever had been entitled to any charge or incumbrance on the several estates, devised by the will of Mary Bowes, or any of them.

To this report, the Appellants and their trustees filed an exception, submitting, that according to the true construction and effect of the proposals set forth in the report of the Master, made in the cause of *Finch v. Delaval*, and the articles for a settlement, the events upon which the Respondent Thomas Bowes, Earl of Strathmore, covenanted, as therein mentioned, took place, as far as respected the estates devised by the will of his grandmother, Mary Bowes, upon his coming into

possession of those estates, under the devises or limitations in the same will contained, by and upon the decease of his elder brother George Bowes, without issue, on the 31st of December, 1806.

The causes came on to be heard before the Vice Chancellor, on the 18th of March, 1829, for further directions, and as to the matter of costs reserved by the decree of the 9th of June, 1825, and the matter of the last mentioned exception coming on at the same time to be argued, the Court held the exception to be insufficient, and ordered that the same should be overruled, and that the Master's report, dated the 22d of May, 1827, should be confirmed, and that the sum of 5*l.* deposited on setting down the exception, should be paid back to the Appellants, John Walpole Willis, and Lady Mary Isabelle his wife; and the Court declared that the 10,457*l.* 10*s.* 3*d.* reduced 3*l.* per cent. bank annuities, standing in the name of the Accountant General of the Court in trust, in the cause of *Braham v. Bowes*, "The "Marriage Articles Account," and the 2,687*l.* 14*s.* 6*d.* bank 3*l.* per cent. annuities, standing in the name of the Accountant General, in trust, in the same cause, "The Marriage Articles Interest "Account," were applicable to the payment of the arrears due to the respective incumbrancers, included in the Master's report of the 6th of July, 1821, according to their respective priorities, subject to the payment of the costs thereafter directed to be taxed; and the costs of all parties were ordered to be raised and paid out of the said 2,687*l.* 14*s.* 6*d.* bank 3*l.* per cent. annuities.

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Against this decretal order the appeal was presented.

For the Appellants.—*Mr. Horne* and *Mr. Wigram*.

The language of the covenant contained in the settlement of the 28th of February, 1800, does not pursue the language of the proposal, which it was the object of the settlement to carry into effect.

The order of the 5th of February, 1800, did not authorize the Master to deviate from the proposal, except in one particular, not material to the present inquiry. The case must first be considered, as if it rested upon the proposal, and as if a Court of Equity were now for the first time called upon to execute such proposal by a proper settlement: but the order complained of is erroneous, when the question is considered upon the effect of the proposal and the settlement taken together.

Suppose the case to rest on the proposal alone, and that a Court of Equity was called upon for the first time, to execute that proposal by a proper settlement: the order which proceeds upon the ground that the covenant was to take effect only in case Thomas Bowes should become seised of an estate of inheritance, is clearly erroneous: Because, by the proposal, Thomas Bowes, in express terms, contracts that his life estate under Mary Bowes's will, shall, for some purpose or other, be subject to the trusts of his marriage settlement: and a Court is not at liberty to look out of the proposal in search of the intention of the parties, where the words they have used, are

capable of a sensible interpretation. Now, if the limitation which relates to the 8,000*l.* be referred to the life estate to which Lord Strathmore was entitled under Mary Bowes's will; and if the other limitations contained in the proposal, be referred to the estate of inheritance, to which Lord Strathmore was entitled under George Bowes's will; the words of the proposal will receive a clear and sensible construction, giving effect to every branch of the proposal, and consistent with the declared intention of its author.

Although by the proposal, Thomas Bowes, now Earl of Strathmore, in express terms, contracts that his life estate under Mary Bowes's will, shall, for some purpose or other, be subject to the trusts of his marriage settlement: and although the words of the proposal admit of a clear and sensible construction, the effect of the order of the 18th of March, 1829, has been to determine, that Thomas Bowes, did not contract that his life estate under Mary Bowes's will, should, for any purpose, whatever, be subject to the trusts of his marriage settlement, and in effect, to strike out of the proposal and settlement, every word which relates to Lord Strathmore's life estate under Mary Bowes's will.

If a Court were at liberty to look out of the proposal, in search of the intention of the parties, the construction of the proposal would still be the same: for Lord Strathmore did not, in fact, under any limitation "in his favour" contained in the will of his "grandmother," take any estate, except his life estate, over which, "in twelve months next after coming into possession" thereof, he would have powers commensurate with any

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construction of the language of the covenant he proposed to enter into. The words of the instrument, are, therefore, the safest, as in truth they are the only legitimate guide, by which the intention of the parties are determined,

The construction which the words of the proposal require, is confirmed by reference to the limitations, to which the estates comprised in Mary Bowes's will stood subject at the time of Lord Strathmore's marriage, and the state of his family at that time, with reference to these circumstances, it is not possible to suppose that those estates were proposed to be brought into settlement for any purpose, other than that which the words of the proposal express, namely, that of charging Lord Strathmore's life estate with a provision for the younger children of the intended marriage.

The construction which the words of the proposal require, is also confirmed by the fact, that the life estate to which Lord Strathmore was entitled under Mary Bowes' will, was, in truth, the interest of the greatest value, if not the only valuable interest which he had power to bring into settlement; and it is reasonable to suppose that the friends of Miss Carpenter would stipulate, and that Lord Strathmore should consent, that until a moderate provision was secured for the children of the intended marriage, Lord Strathmore's immediate personal interests should be postponed.

Considering the case as it stands upon the effect of the proposal and the settlement together, the order of the 18th of March, 1829, is erroneous; because the language of the covenant con—

tained in the settlement is capable of that construction which the proposal requires, and there is nothing in the language of the covenant by which that construction is excluded. If the rights of the parties under the proposal are such as the Appellants contend for, and if the language of the covenant does not confirm and secure those rights, then inasmuch as the mistake by which their just rights will be defeated is the mistake of the Court of Chancery and not of the parties to the settlement, the judgment of that Court upon the exceptions to the Master's report ought to have been suspended until an opportunity had been afforded of rectifying the mistake.

For the Respondents, the case was argued upon the intent of the parties appearing in the proposals and settlement. It was also objected that there was a defect of parties to the appeal.

At the conclusion of the argument, the Lord Chancellor, in moving the judgment, said, that the case was not without difficulty; but that the proposal was to be construed, together with the covenant which contained the word "inheritance," and this was inconsistent with the supposition that the life estate of the proponent was to be subject to the charge: that the conduct of the parties indicated the intent of the proposals, by the language of the covenant, the same master who received the proposals having approved of the settlement. He therefore recommended that the judgment should be affirmed.

Judgment affirmed.

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ENGLAND.

(COURT OF EXCHEQUER.)

JOHN DENCHFIELD, AUGUSTUS }
LINES and MOLLY LUCAS - } *Appellants.*

PHILIP STRONG, Clerk - - - *Respondent.*

S. as Vicar of A. filed a bill in equity stating a title by endowment, usage, or otherwise, and claiming against the occupiers of certain farms all tithes, except of corn and grain. The Defendants by answer admitted that S. was Vicar, but stated that they did not know whether he was entitled by endowment, or usage, or otherwise, to all the tithes, except grain, or to what tithes he was entitled, except as after mentioned, and then they set up a modus, which they stated to be payable in respect of their farms, in lieu of all tithes belonging to the vicarage. No proof of endowment was given on the part of the Vicar, nor of any perception of tithes. On the contrary, it was proved that no tithes had been rendered in kind for thirty years before the commencement of the suit; but that a sum of 37*l.* had been paid to the Vicar for the tithes of the farms occupied by the Defendants. At the hearing an issue was directed to try the validity of the modus.

This order was affirmed on appeal.

IN the year 1823 the Respondent was inducted into the vicarage of Aston Abbots, in the county of Buckingham.

Under an act of parliament passed in the thirty-fifth year of the reign of George the Third, entitled, “An act for dividing and enclosing the “open and common fields, wastes, and other “commonable lands, within the parish of Aston “Abbots, in the county of Buckingham,” certain

portions of land were allotted to the Vicar in lieu of the glebe land belonging to the vicarage, and of the tithes in kind to which the Vicar had up to that time been entitled out of the greater portion of the lands then enclosed. This act of parliament did not extend to the lands within the hamlet of Burston, which is situated in the parish of Aston Abbots.

The Respondent, in January, 1826, exhibited his bill in the Court of Exchequer against the Appellants, who were occupiers of lands within the hamlet of Burston in the parish of Aston Abbots. In this bill the Respondent stated, that as Vicar of Aston Abbots, he was entitled, by some ancient endowment, usage, or otherwise, to all tithes whatsoever (except only the tithes of corn and other grain) arising, growing, renewing, and increasing within the parish and the titheable places thereof: and after stating that the Appellants were occupiers of lands in Burston, and had grown various titheable articles on their lands, the bill prayed that they might be compelled by the decree of the Court to come to an account with the Respondent for their tithes.

To this bill the Appellants put in their answer in the month of January, 1827; by which they admitted the Respondent to be Vicar of Aston Abbots, but stated, that they were unable to set forth whether he was entitled by any ancient endowment, usage, or otherwise, to all the tithes whatever (except the tithes of corn and other grain) arising, growing, renewing, and increasing within the said parish of Aston Abbots, or the titheable places thereof, or to what tithes in particular he was entitled in respect of the said vicarage, except as thereafter mentioned. They ad-

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mitted the hamlet of Burston to be within the parish of Aston Abotts, and that they occupied together about seven hundred acres of land therein which they described. They likewise admitted, that they had grown various titheable articles on the said lands, and that no allotment had been made to the Respondent in lieu of the tithes of any of their said lands, under an act of parliament passed in the thirty-fifth year of George the Third, for dividing and enclosing lands within the parish; but they stated that they had not paid any of their tithes to the Respondent, because the sum of £37. was payable yearly as a modus for their several farms, in satisfaction of all and singular the tithes belonging to the said vicarage.

To this answer the Respondent replied; and the cause being at issue, a commission was issued, and witnesses were examined on both sides.

On the 8th of May, 1828, the cause came on to be heard before the Chief Baron of the Court of Exchequer, and was argued on that day, and on the 8th and 10th of June following. Upon this hearing the Appellants read the depositions of several witnesses, who had all been examined for the purpose of proving that the payment of £37. was a good modus; and the result of their evidence shewed that this payment had in fact been made for the last thirty years, and that no tithe in kind had been taken by the Vicar during that period in respect of the lands of the Appellants. They also produced a terrier, dated 7th June, 1810, for the same purpose.

The Respondent produced an office copy of an extract from the nona rolls, an office copy of an extract from the general ecclesiastical survey made in the twenty-sixth year of the reign of

Henry the Eighth, an office copy of the minister's accounts of the possessions of the Abbey of St. Albans, in the thirty-third year of the reign of Henry the Eighth, a memorandum found at the beginning of a parish register of Aston Abbots, containing entries of baptisms, marriages, and burials, from the year 1559 to the year 1678; and another parish book, of a similar nature, bought by the parish in the year 1694, into which it appeared that the memorandum found at the beginning of the former register had been copied in May, 1703, by the then Vicar and churchwardens of the parish. No endowment of the vicarage was produced on the part of the Respondent, nor any specific evidence of the perception of any tithes in particular.

On the 18th of November, 1828, a decree was pronounced by the Chief Baron of the Court of Exchequer, whereby it was ordered, that a trial at law should be had upon the following issue, to wit: Whether from time whereof the memory of man runneth not to the contrary, there hath been payable and paid, and of right ought to be paid, in each and every year, by the occupiers of the farms and lands of the said Defendants for the time being, situate in the hamlet of Burston, in the parish of Aston Abbots, in the county of Bucks, in the pleadings of this cause mentioned, to the Vicar of Aston Abbots for the time being, by equal half-yearly payments, at Lady-day and Michaelmas-day in every year, or as soon after as demanded, the yearly sum of £37., as a modus or immemorial customary payment, for and in lieu and full satisfaction of all and singular the tithes belonging to the said vicarage of the said parish, yearly arising, growing, renewing, and

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increasing in and upon the said farms and lands ; which issue is to be tried in a feigned action, to be for that purpose brought in the office of Pleas of this Court, wherein the said John Denchfield, Augustus Lines, and Molly Lucas, the Defendants in equity, are to be Plaintiffs at law ; and the said Philip Strong, clerk, the Plaintiff in equity, is to be the Defendant at law ; with other directions as to the time and place for the trial of the said action : and the consideration of costs, and all further directions, were reserved till after the trial of the said issue.

From this decree the appeal was presented.

For the Appellants—*The Solicitor General* and *Mr. Boteler*.

The Vicar in this case having set up a title to all but two species of tithes, he must shew to what tithe he is entitled : he must shew a title by endowment or prescription, and of this there must be proof, or an admission by the Defendant.

It has been argued that the plea of a modus is an admission of the title to the tithe covered by the modus. Suppose no modus had been set up, the bill must have been dismissed, unless the right had been shewn by the Plaintiff. If the modus is imperfectly pleaded it may fail, but how can it shew what are the tithes to which the Vicar is entitled. The Defendant by his answer says, he cannot set forth to what tithes the Plaintiff is entitled : no inference can be drawn from the plea of a modus. The Plaintiff not having shewn a title to any thing, the bill ought to have been dismissed. At all events the issue is wrong. If the verdict should be against the Appellant, it will be necessary to go to a new trial to ascertain what

are the tithes to which the Vicar is entitled. This would be a singular proceeding to direct one issue as the foundation for another. The Court directs either one issue to try the whole question, or one absolutely and another conditionally. If the issue had been whether the Vicar was entitled or not, it would have tried the whole question as in the case of an issue *devisavit val non*. If the Defendant sets up a modus, and the Plaintiff has proved a title, and the modus fails, there must be a decree: but if the Plaintiff shews a modus, he cannot have a decree. The case set up by the Plaintiff (Respondent) shews a modus of 6*l.* 13*s.* 8*d.* The effect of this in point of law is that he cannot have a decree.* The direction of an issue as to the existence of a modus is to admit tithes to be due, which is denied by the Defendant. Such an issue excludes the trial of the first point. Whenever it appears that there is a modus, whether by the shewing of the Plaintiff or incidentally, the Plaintiff cannot have a decree. *Ekins v. Dormer*.† *Scott v. Fenning*.‡ The Court cannot in the face of evidence give to the Plaintiff a decree for tithe in kind. A Court of Equity cannot direct an issue to try a ground for directing another issue. The object of a Court of Equity is at the earliest period to decide all questions between the parties. If an issue is to be directed, it should be a general issue, whether the Vicar is entitled; or two issues, 1st—whether he is entitled; 2d—to what tithes. The Defendant might have been bound by the modus so set up, if the Plaintiff had not set up another modus.

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* *Carl v. Ball*, 1 Ves. † 3 Alk. 534. ‡ Gwill, 1250.

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For, the Respondent—*Mr. Pemberton and Mr. Thomson.*

Where a suit is instituted by a Vicar, claiming certain specified tithes, it is incumbent on a Defendant, who rests his defence on the existence of an alleged modus, to point out distinctly in respect of what particular tithe such alleged modus is payable; nor can he in any case be permitted to derive an advantage from the inaccuracy or insufficiency of his own pleading. If, therefore, the decree pronounced at the hearing of the suit, direct an issue for the purpose of trying at law the validity of the modus set up by the Defendant's answer, according to the terms in which it is there stated, it is not open to the Defendant to object to that decree on the ground that it is impracticable to try the validity of the modus by reason of the uncertainty of the terms which he has himself used to describe it, even though such objection actually exist. And on the same principle, if the modus is stated to be payable in lieu of the tithes due to the Vicar, it is an admission, in the absence of any other defence, that but for the existence of the modus in question, the Vicar would be entitled to the tithes claimed by him.

Independently of the evidence of his title afforded by the admission of the Appellants themselves, the Respondent has in the present case a strong *prima facie* title to the tithes of Burston hamlet, founded on his receipt either of tithes in kind, or of some satisfaction in lieu of them, out of the other lands in the parish of Aston Abbots; and the Appellants have neither ventured to assert that their lands in Burston are altogether exempt from the payment of tithes to the Res-

pondent, nor have they attempted to shew that any satisfaction whatever is in any way made in respect of such tithes.

If the decree were to be varied in the mode proposed by the Appellants, and the bill dismissed, it would amount to a declaration by the Supreme Court of Judicature, that the Appellants were entitled to hold their lands discharged from the payment of any vicarial tithes, in the face of an express admission to the contrary in their own answer; and the same objection applies with equal force to the proposed variation of the decree, by directing an issue to try whether the Respondent, as Vicar, is entitled to any, and what tithe.

The cases of *Lewis v. Young*,* *Stokes v. Jervis*,† and *Blake v. Veysie*,‡ were cited.

In the course of the argument, the Lord Chancellor said :—

The issue is directed to try the allegation of a fact made by the answer. The Defendant alleges a modus: the issue is to try the modus in the very terms in which it is alleged. If the verdict is one way, the whole matter is disposed of. If it should be necessary to try a second issue, that is the consequence of a defect in the pleading of the Defendant. But the Chief Baron doubted whether it would be necessary to direct another issue.

In the notes of what passed in the Court below, is a passage which is omitted in the

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* 13 Pri. 394, 1 McL. and Y. 11. † 1 Y. and J. 436.

‡ MSS. D. P. 1814, 15, and 3 Dom. 189.

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printed report; but it is material. The Chief Baron says, he should direct the issue tendered by the answer, unless it was settled by agreement in some other way. What he says in another place is worthy of attention: admitting that a Vicar can claim by the production of an endowment only, or by some usage from which an endowment is to be presumed, he goes on to observe, that the usage commonly employed to raise this presumption is an actual perception of the tithes; but that it would follow from the same principle that where the circumstances do not afford this ground for the presumption, others may be resorted to, if in good sense such other circumstances may warrant the presumption. He then adds, "If it were necessary for me at this moment, to point out what those circumstances are in this case, and what tithes I should have presumed the endowment to have conferred on the Vicar, I think I should be able to do so without hesitation." He does not seem to think that nothing is made out by the Vicar, but that the occupier should make out his defence.

At the conclusion of the argument in moving the judgment, the Lord Chancellor observed, that it was to be taken, that in substance by the answer the Defendants set up a modus covering the tithes claimed by the Plaintiff's bill, although the expression of the answer was not precisely so; that if the Defendant's answer did not sufficiently shew what their modus covered, it was their own fault: that the issue was properly directed in the words of the answer.

Judgment affirmed.

IRELAND.

(COURT OF CHANCERY.)

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JANE CARMICHAEL, W. BOURNE,
 and E. his Wife; G. GIBBS, and J.
 his Wife; HUGH CARMICHAEL,
 and J. CARMICHAEL, Executors,
 &c.; Z. CARMICHAEL, said HUGH
 CARMICHAEL, and JAMES CAR-
 MICHAEL,

} *Appellants.*

THOMAS WILLSON - - - *Respondent.*

Et e Contra.

W. a solicitor having been appointed and acting as an executor in the administration of the affairs of the estate, brought and defended many suits, in which he employed himself as the Attorney. Upon a bill filed by the residuary legatees against the executor, it was referred to the Master, to inquire whether any money due to the estate had been lost by the negligence of W.; and whether the suits had been properly commenced, prosecuted, and defended; and that he should tax the costs for business done by W., as attorney in those suits, *without prejudice* to the question whether W., being an executor, was as an attorney to be allowed such costs, except so far as he had disbursed money. Upon this decree the Master reported, that some of the suits had been properly commenced, but negligently conducted, so that the recovery of the property in question in those suits had been probably endangered, and he made no allowance of costs to the executor, but submitted to the Court whether the claim for costs should not be suspended until the debts should be recovered, &c. Exceptions taken to this part of the report were by the decree, on farther directions, over-ruled, and on appeal this part of the decree was affirmed.

By the decree upon further directions, it was also ordered that interest should be charged upon all balances in the hands of the executor, at the end of every year, and that interest should be charged against the residuary legatees upon all advances made to them by the executor from the time of the advances. Upon appeal, this order was varied, by declaring that the

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Master should be directed, in taking the accounts, to make a rest and state the balance at the end of each year, and to charge the executor with interest on such balance, and to apply such interest, as might be so found due from him in each year, in the first place towards his future payments, before any application should be made of the balance of principal money in his hands.

Whether an executor being a solicitor, and acting as such in the administration of the estate, by bringing or defending suits or otherwise, is entitled to an allowance for costs, in respect of his professional labour, beyond costs out of pocket, and if so whether as between solicitor and client.—*Quære.*


ANDREW CARMICHAEL, by his will, bearing date the 24th day of April, 1794, gave, devised and bequeathed, the sum of five shillings to Elizabeth Crofton, otherwise Carmichael; and all the residue of his property he devised and bequeathed, equally to be divided, share and share alike, among his widow and children; he appointed the Respondent, who had married his daughter Margaret, sole executor. The testator died, on the 4th of May, 1794, without altering or revoking his will.

The testator was a practising attorney, and clerk of the crown and peace for various counties in Ireland, and almost the whole of his assets, consisted of bonds, mortgages and judgment debts; money having been lent out by the testator on those securities to one hundred and fifty persons. The Respondent, who served his time as clerk to the testator, and was in his employment conducting his business at the time of his death, prosecuted, in his character of executor and as attorney, sixty suits at law and fifteen suits in equity, for the recovery of the mortgage and judgment debts due to the testator. He also de-

fended eleven suits in equity and three suits at law, commenced against him as executor.

The Appellants, who were legatees and representatives of legatees, on the 17th of October, 1812, filed their bill in the Court of Chancery against the Respondent, charging mismanagement and misapplication of the assets; and praying an account of the personal estate and effects of the testator received by the Respondent, or which without his wilful default might have been received; and that in taking the accounts, yearly rests should be made and interest charged on the balances; and that the Respondent might be ordered to tax his costs against the estate of the testator, in presence of Plaintiff's solicitor, and be allowed only such costs as were necessarily and properly incurred, and for the benefit of the testator's estate; and that the usual accounts might be taken.

The Respondent filed his answer to the bill, on the 5th of May, 1813, with schedules, giving an account of the receipt and expenditure of the assets which had come to his hands.

The cause was heard on the 14th of April, 1818, when it was decreed, that so much of the Appellant's bill as related to the offices in the pleadings mentioned should stand dismissed with costs, and it was thereby referred to the Master, to take an account of the personal estate and effects of the testator, and of what the same consisted, when and by whom received, and how applied and disposed of, and particularly of such parts thereof as came to the hands of Respondent, or which but for his wilful default might have been received by him: to make yearly rests of the

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balances in the hands of the Respondent, and to compute interest on the balance from the end of each year, without prejudice to the question, in what manner the Respondent should be charged in respect thereof, and that the Master should also take the account without making rests or computing interest, and that the Master should also take an account of the debts, legacies, and funeral expenses of the testator, and should enquire and report whether any and what sums of money due to the estate of the testator, were lost by the default or negligence of the Respondent, and whether any and which of the suits in the pleadings mentioned were necessarily and properly instituted, carried on, or defended, and for the benefit of the estate, and whether the same were so instituted, or defended, with the knowledge and approbation of the Appellants or any of them, and that the Master should tax and compute the amount of the Respondent's several bills of costs for business done by him as attorney in the several causes in the bill mentioned, without prejudice to the question whether the Respondent being an executor, was, as an attorney, to be allowed such costs except so far as he had paid and disbursed money on account of such costs.

The Master by his report, made in pursuance of the decree, bearing date the 9th of June, 1825, stated the substance and effect of the will: the death of the testator, leaving seven children, and the appointment and grant of probate to the Respondent as executor: and that the testator was, at the time of his death, possessed of personal property, consisting of *debentures of Commissioners of wide streets*, Government three and a half de-

ventures, cash debts due to him upon mortgages and judgments, bonds, bills, notes, and book accounts, and an interest in a dwelling-house, and premises, in Bride Street, in the city of Dublin, amounting in the whole to the sum of 30,078*l.* 18*s.* 10*d.*, besides other property.

The Master further reported that of this property the Respondent received, at various times from the 4th of May, 1794, to the 5th of December, 1824, several sums of money, amounting in all to the sum of 37,045*l.* 7*s.* 3½*d.* That the Respondent had laid out and expended at different times in payment of the debts and funeral expences, and proving the will, a sum of 1,906*l.* 2*s.* 10½*d.* and that he also expended in prosecuting and defending the several suits at law and in equity, touching the assets of the testator, several sums of money, amounting in all, as costs out of pocket in prosecuting and defending the same, to a sum of 1,102*l.* 3*s.* 3½*d.*, making with the sum of 1,906*l.* 2*s.* 10½*d.*, in all a sum of 3,008*l.* 6*s.* 0¼*d.* paid and disbursed, and for which he was entitled to credit out of the assets of the testator, leaving a balance of 34,037*l.* 1*s.* 0½*d.* principal money, distributable among the residuary legatees, and that the costs of the suits so prosecuted and defended, as taxed between solicitor and client, amounted to a further sum of 773*l.* 5*s.* 1¾*d.*, which further sum, in the event of the Lord Chancellor's deciding that the Respondent was, under the circumstances of this case, entitled to credit for the same, was to be deducted also from the sum of 37,045*l.* 7*s.* 3½*d.*, leaving, in that case, a principal sum of 33,263*l.* 15*s.* 10¾*d.* only, distributable among the residuary legatees, and that, pursuant to the directions in the decree con-

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tained, he had examined and investigated sixty-four several bills of costs furnished and claimed by the Respondents as the costs incurred by him in prosecuting and defending several suits at law and in equity, touching and concerning the assets of the testator, four of which the Master thought were in causes unnecessarily commenced, two of the causes were unconnected with the assets, and fourteen in causes, which, though necessarily and properly instituted, were negligently and improperly carried on or defended; and therefore, he had disallowed the Respondent credit for the several bills of costs claimed by him for suits so improperly instituted or negligently conducted.

The Master by his report then stated, that the suit instituted by the Respondent Thomas Wilson, as executor of Andrew Carmichael, against James Robinson, to foreclose a mortgage, was unnecessarily and unadvisedly commenced without the knowledge of the parties interested in the assets of the testator, and that the costs of that suit should not therefore be allowed to the Respondent as against the assets, and that he therefore disallowed the same: and he further reported, that the suit instituted by the Respondent against Lord Meath had been unnecessarily and unadvisedly instituted, without a due regard to the advantage of the estate of the testator, and therefore, he disallowed the Respondent credit for the costs of the same.

The Master further reported, that the several suits instituted by the Respondent as executor of Andrew Carmichael, against Lawrence Geoghegan, against Deborah and Thomas Lowndes, against Arthur Nicholl, and against Martin Arm-

strong and others, were properly instituted and commenced by him as executor, but that those causes were not conducted with due diligence or due regard to the interest of the estate, or the peculiar circumstances of the properties on which the debts due in those cases were secured, and that by such delay and default in prosecuting those causes, the recovery of the debts due in all of them had been unnecessarily delayed, and in some of them, *probably* endangered; and that he had therefore, disallowed the Respondent credit for the costs of the same, and submitted whether the claim of the Respondent for the costs of those suits *should not for the present be postponed*, till the debts due in those causes should be respectively recovered, and the Respondent be enabled to recover the costs, as between party and party, out of the estates, with liberty to claim against the assets for such bill of costs as between solicitor and client, when duly taxed, as might then eventually and fairly be due to him.

Then the Master by his report stated, that two causes of Wilson against Wilson, and the contrary, were causes unconnected with the assets of the testator, and that he therefore disallowed any costs claimed by the Respondent as expended in those causes, except the costs of proving the charge of the executor under the decree made in these causes up to Easter term, 1816.

The Master further reported, that he had pursuant the decree, made yearly rests in taking the account, and had calculated interest on the balance distributable among the residuary legatees from year to year, and found that such interest amounted to a sum of 31,344*l.* 18*s.* 3*d.*,

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the particulars of which yearly balance, an dividend thereon, was set out in the third schedule to the report.

But the Master found by his report, that although these sums were distributable among the residuary legatees of the testator, that in fact such balances did not remain in the hands of the Respondent at the end of each year, he having made several payments to the legatees out of such apparent balances, on account of the respective shares of the residue of the testator's property, by which the balances in his hands would be considerably diminished, if not, on some occasions entirely extinguished.

The Respondent, on the 20th of June, 1825, filed the following exceptions to the report. 1st exception,—That the Master had reported that Geoghegan's action was not conducted with due diligence; whereas no evidence was laid before him to warrant the disallowance of the taxed costs in this and a cross cause, amounting to 498*l.* 6*s.* 6*d.* 2d exception,—That the said Master had reported that the suit instituted against Nicholl and others, was not conducted with due diligence, there being no evidence before him to warrant such conclusion, and that the costs, amounting to 113*l.* 0*s.* 6*d.* ought to have been allowed to the Respondent. 3d exception,—That the Master had reported that the suit instituted against Armstrong, was not conducted with due diligence, no evidence having been laid before him to warrant such conclusion, and that the costs, amounting to 482*l.* 9*s.* 3*d.* ought to have been allowed to the Respondent. 4th exception,—That the Master had reported that the suit insti-

tuted against Lowndes was not conducted with due diligence, no evidence having been laid before him to warrant such conclusion, and that the costs amounting to 368*l.* 8*s.* 6*d.* ought to have been allowed, the Appellants having taken an annuity deed to secure such costs and the debt. 5th exception,—That the Master had reported that the suit instituted against Robinson, was without the knowledge of the parties, there being no evidence to warrant such conclusion, and that the costs, amounting to 160*l.* 15*s.* 1½*d.* ought to have been allowed to the Respondent. 6th exception,—That the Master had reported that the suit instituted against the Earl of Meath was unadvisedly instituted, there being no evidence to warrant such conclusion; but it appeared in evidence, that the suit was instituted under the advice of counsel, and that the Master ought to have allowed the Respondent credit for the costs. 7th exception,—That the Master by his report and 3d schedule, had only given Respondent credit for the costs out of pocket in each year, whereas he ought to have given the Respondent credit for the taxed costs, as between solicitor and client. 8th exception,—That the Master had omitted to give the Respondent credit for the costs necessarily disbursed in the actions against Geoghegan, *et e contra*, against Nicholl and others, against Armstrong and others, against Lowndes, against Robinson and others, and against Lord Meath; no evidence being before him to support such decision, nor was he warranted by the decree to disallow the same. 9th exception,—That the Master did not, by his report and schedules, give Respondent credit for the different sums of money paid to the Appellants on account of their

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legacies, whereby he calculated interest on fictitious balances, amounting to 25,600*l*, 2*s*. 9*d*.; whereas he ought have given the Respondent credit, year by year, for such payments and his taxed costs and expences in every year during the period.

The cause was heard on the report, exceptions and merits, on the 13th and 14th of July, 1825, when the first, second, and third exceptions (which are made the subject of the Respondent's cross appeal) were overruled, and on the 14th of July, the fourth, fifth, and sixth exceptions were allowed. The other exceptions stood over.

The report having been rectified according to the order on the fourth, fifth and sixth exceptions, the Appellants set the cause down to be heard on the original and rectified report, the exceptions which stood over, upon the merits, and for further directions. It was heard on the 6th of December, 1825, when the seventh and eighth exceptions (which are also made the subject of the Respondent's cross appeal), were overruled, and on hearing the ninth exception, the following order was made.

“ That the matter should go back to the Master,
 “ and that he should make a rest at the end of the
 “ first year after the testator's death, and ascertain
 “ the sum actually in the Respondent's hands at the
 “ end of that year, after all just allowances, and
 “ also ascertain how much of that sum, if any,
 “ was distributable among the residuary legatees,
 “ having regard to the disbursements to be pro-
 “ vided for in the ensuing year, and that he
 “ should thus ascertain the shares of each of the
 “ residuary legatees at the end of the year; and that
 “ he should also report the payments made to or

“ on account of each of the residuary legatees in
“ that year, and strike a balance on foot of the
“ account of each of the residuary legatees at the
“ end of that year ; and in like manner that the
“ Master should take the same accounts and
“ make rests at the end of each year, to the date
“ of his report, such several accounts to be with-
“ out interest, but reserving to the Court the
“ consideration of the question, whether interest
“ should be thereafter charged upon any of the
“ accounts ; and all further directions were
“ reserved.”

In pursuance of this decretal order, the Master by his report, on the 24th of February, 1826, stated the accounts according to the direction of the report; setting forth in the 1st schedule to the report the balances in the executor's hands, year by year, after such allowances, as directed by the decree: and in the second schedule, the separate accounts of each legatee, shewing the receipts and disbursements, and the balances for and against the Respondent at the end of each year.

The Master also stated in his report the amount of sums paid by the Respondent to each of the legatees; whereby it appeared, if the Court should be of opinion that the accounts had been taken upon a just principle, that some of the legatees were entitled to balances on the account, but that the Appellants W. Brown, G. Gibbs, Z. Carmichael, H. Carmichael, and J. Carmichael, had all been over-paid by the several sums stated in the account. But in making up such accounts, the Master stated that he had not charged any interest, being directed by the decree not to do so, but had deducted the whole of

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the Respondent's disbursements and allowances to him, and payments to the legatees, whether infants or adults, or whether paid recently after the testator's death or otherwise, out of the principal of the assets, and of their respective shares thereof, wherewith the Respondent was chargeable, and therefore, he thought it right to explain to the Court that it was only in the event of a decision that the Respondent should not be charged with interest, that he (the Master,) intended to represent such accounts, and the balances thereby struck as true and binding accounts between the legatees and the Respondent, especially the infant children of the testator appearing to have been so brought in debt to the Respondent by reason of the payments to them for maintenance and otherwise, and other disbursements of the Respondent having been deducted out of the principal of the assets, and out of the principal of the shares of the legatees thereof respectively.

The Master stated farther that he had only made up his report in respect to the assets that came to the hands of the Respondent, to the 5th of December, 1824, and did not take any account of any assets of the testator which might have come to the hands of the Respondent, between the 5th of December, 1824, and the time of making the Report.

The cause on this report and the merits, and also for further directions, was heard on the 30th and 31st of May, 1826, when the following decretal order was made.

“ Refer it back to the Master, and in the tak—
 “ ing of the accounts let the Master charge simple—
 “ interest on the sums found by the report to b—

“ in the executor’s hands in each year to the
 “ date of the 24th of February, 1826, as the
 “ shares of the legatees, and credit the execu-
 “ tor with the payments in each year, with
 “ interest from the time of such payments to the
 “ date of the report, (except as to the infants
 “ during the period of their infancy,) and declare
 “ that during such period the executor is not
 “ to be credited with payments beyond the
 “ interest on the shares of the infants; and let
 “ the Master strike a balance on the several ac-
 “ counts between the executor and several parties
 “ respectively; and as to the other points, let the
 “ same and all further directions be reserved
 “ until the return of the Master’s further report.”

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The original appeal was by the legatees against this order.

The cross appeal was by the executor against the order of the 13th of July and 6th of December, 1825, overruling the seventh and eighth exceptions.

For the Appellant in the cross appeal—On the question of costs it was argued that his character of executor did not alter his right to costs, to which he would have been entitled even at law. Nothing less than the loss* of the debt by negligence would deprive the attorney of costs; that since he acted as attorney in the affairs of the estate, the common rule that an executor is

* *Templer v. McLachlan*, 2 Bos. and Pull. N. R. 136. This was only a decision that such matter could not be set up by way of defence to an action upon an attorney’s bill.—See *Farnsworth v. Garrard*, 1 Camp. N. P. C. 38. and *Denew v. Deverell*, 3 Camp. 451. both of which being actions for work and labour, with the common counts, it was held that imperfect performance of the work was good ground of defence to reduce the damages or displace the ground of action.

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not entitled to charge for personal trouble does not apply: * that the Master had found the suits properly instituted, and at all events, the rule, if applied, went only to charges for personal attendance, &c. As to the question of interest, it was argued that the sums expended should be set off against the sums received, not against the interest of the balance in hand.†

For the Respondent in the cross appeal—The case was rested on the Master's report and the rules of equity as to interest and costs.

The Lord Chancellor.—The papers which are on the table contain several decrees of the Court of Chancery of Ireland, and a variety of reports made by the Master in this suit, and the first impression which any one must receive of the case is, that it is extremely involved and complicated; but I think, I shall be able to state in a very few words the real points for consideration and decision in this cause.‡

I have heard the case argued at very considerable length. I have since read through the printed papers, and I see no reason whatever for dissenting from the opinion expressed by the Master, and confirmed by the Lord Chancellor, for it appears to me on an attentive and considerate review of the whole of the evidence, that there has been extreme delay and negligence in the prosecution of those causes. The question therefore comes to this, whether the Master seeing that the executor had not taken the means,

* *Robinson v. Pett*, 3 P. W. 251.

† See *Tebbs v. Carpenter*, 1 Madd. 290. *Larkin v. Weston*.

‡ Here the Lord Chancellor stated the facts and pleadings, as before set forth.

which it was his duty to take, to bring to a conclusion, the suits he had commenced ought to have allowed these costs. It appears to me that the Master did not judge wrong in the report which he made, and that he was justified in what he did, by the meaning of the decree of April, 1818. This appears to me to be the true import of that decree,—that if the Master should be of opinion, that the suits were improperly instituted, or improperly and negligently carried on, those costs ought not to be allowed. That must have been the opinion of the Lord Chancellor when this case was brought before him, and who originally pronounced the decree of April, 1818. I would therefore, recommend that the Judgment in that respect should be affirmed.

This will dispose substantially of the exceptions, but there is a question of considerable importance between these parties, and to which I must also direct your attention. The Lord Chancellor was of opinion, that in consequence of the conduct of the defendant, he ought to be charged with interest upon the money in his hands; and by his decree in the month of May, 1826, he has directed that interest shall be calculated on the sums in the executor's hands in each year as the shares of the legatees, and he has directed that on the other hand, interest shall be allowed on the payments made in each year to the respective legatees. Now it appears to me that such a mode of calculating the interest and making up the account is open to objection. It would follow that if there was a large sum due by the executor for interest in any year, and more than

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sufficient to satisfy the payment to the legatee, the latter would nevertheless be charged with interest upon the sum so paid. It appears to me that that is not the proper mode of stating the account of interest in a case of this description, and that the only proper mode of calculating the interest is that there should be a rest at the end of each year, and a balance struck, and interest charged upon that balance. I should, therefore, suggest that the decree made in the month of May, 1826, should be varied and amended in the manner I have stated, namely, that instead of charging interest on one side of the account, and giving credit for interest on payments on the other side of the account, which appears to me open to the objection I have stated, there should be a rest made yearly, and the interest calculated on the balance at the end of the year. Subject to this alteration, I should submit to you the propriety of affirming the judgment.

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It is ordered and adjudged, &c., that the said decretal order complained of in the said original appeal be varied, by declaring that the Master should be directed, in taking the accounts, to make a rest and state the balance at the end of each year, and to charge the executor with interest on such balance, and to apply such interest as may be so found due from him in each year, in the first place towards his future payments before any application is made of the principal money, and that it be referred back to the Master to take and carry on the subsequent accounts in like manner, from the 5th of December, 1824: And it is further ordered, that with this declaration the cause be referred back to the Court of Chancery in Ireland, to do therein as shall be just and consistent with the said declaration: And it is further ordered and adjudged, that the said cross appeal be, and the same is hereby dismissed this House, and that the orders and decrees therein complained of be, and the same are hereby affirmed.

IRELAND.

(COURT OF EXCHEQUER.)

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MYLES JOHN O'REILLY, Esq. - - *Appellant.*

SARAH FETHERSTON WIDOW, FRANCIS FETHERSTON, JOHN DEVENISH, GEORGE DEVENISH, HUGH CRAWFORD, and JANE his Wife, FRANCIS O'BEIRNE, GERALD WALSH, HUGH WALSH, and JOHN KNOX } *Respondents.*

By the Irish Statute 11 Anne, c. 2, it is enacted (s. 2.) that when more than half a year's rent is in arrear upon a lease, the landlord or lessor may, without demand or re-entry, serve a summons in ejectment for recovery of the demised premises; and upon proof of the fact that more than half a year's rent was due when the summons was served, and that no sufficient distress was to be found on the premises, shall recover judgment and execution; and if the lessee or person claiming under the lease shall suffer judgment to be recovered and execution executed without paying the rent in arrear with costs, or without filing a bill for relief in equity within six months after execution executed, the lessee, &c., shall be barred from all relief or remedy in law or equity, &c., and the landlord, &c., shall hold the premises discharged from the lease.

The Irish Statute 4 Geo. I. c. 5, recites the former statute and the difficulty of proving the want of sufficient distress, and thereupon enacts (s. 2.) that when one year's rent shall be in arrear upon a lease, although there be sufficient distress upon the land to answer the rent in arrear, the landlord or lessor may serve a summons in ejectment, and upon proof that one year's rent was in arrear and due before the service of the summons, shall recover judgment and have execution, and if the lessee, &c., shall not pay the rent in arrear with costs, to be ascertained as in the act provided, or depositing the same in a Court of Equity, on filing a bill, within six months after

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execution executed, he shall be barred from all relief or remedy in law or equity, &c., and the landlord shall hold the premises discharged from the lease.

The Irish Statute 8 Geo. I. c. 2, reciting the former statutes, enacts (s. 4.) that where any lease, for avoiding of which an ejectment is brought, shall before the bringing of the ejectment have been mortgaged for a valuable consideration, and the lessee and mortgagee, and their respective assignees, shall be served with summons in the ejectment, and affidavits of the summons made and filed, and the Plaintiff shall obtain judgment and execution in the ejectment; if the mortgagee or assignee shall not within nine months after execution executed pay or tender to the landlord or lessor the rent in arrear, and costs to be ascertained as in the former acts provided, the mortgagee or his assignee shall be barred of all relief and remedy in law or equity on account of the mortgage, and the landlord or lessor shall hold and enjoy the premises discharged from the mortgage and the equity of redemption.

In the case of a lease subject to a mortgage, the landlord having recovered judgment, &c., according to the statutes, against the lessee, who did not within six months pay or tender, but where the representatives of the mortgagee before the lapse of nine months after execution executed, paid the rent in arrear, and costs: Held that the benefit of that payment enured to the lessee as well as the representatives of the mortgagee.

A suit having been instituted against the landlord by the representatives of the mortgagee to have the benefit of the lease, an account was directed of what was due for rent and costs. In this stage of the cause the representatives of the mortgagee entered into an agreement with the landlord, and executed a deed by which they covenanted not to claim the equity of redemption of the lease.

Upon a bill filed by the representatives of the lessee and mortgagor against the landlord and representatives of the mortgagee to have the benefit of the suit, and to carry on the accounts:—Held that the agreement between the landlord and the representatives of the mortgagee was incompetent and invalid, and that the representatives of the lessee were intitled to the benefit of the suit and the account.



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WILLIAM KNOX, by an indenture dated on the 24th of March 1781, demised the lands of Rahardevin and part of the lands of Ballyspellan in the county of Roscommon (of which lands he was then seised in fee simple) unto Frances Sparks for the term of 61 years from the 1st of May, 1781, at the yearly rent of 200*l.* payable half yearly, on the 1st of May and 1st of November; with a proviso for re-entry in case of the rent being in arrear by the space of 19 days.

On the 1st of April, 1786, William Knox sold and conveyed all his estate and interest in the lands comprised in this lease, unto Dowell O'Reilly, the Appellant's father, and his heirs absolutely.

By an Indenture of assignment, dated on the 20th of April, 1789, the lease became vested in Robert Johnson; on the 20th of December, 1789, he underlet part of the lands of Rahardevin to Mallachy Fallon, for a term of 45 years.

Robert Johnson having borrowed a sum of 2000*l.* from Joseph Preston, by an indenture dated on the 22d of June, 1792, conveyed all the lands comprised in the lease of the 24th of March, 1781, together with the lands of Headfort and other lands in the Counties of Leitrim and Roscommon, (of which he was then seised to him and his heirs under leases for lives, some of such leases containing covenants for perpetual renewal,) unto Joseph Preston, his heirs, executors, and administrators, for the then existing and all future estates therein under the respective leases; but subject to payment of the rents reserved by such leases respectively; and subject also to redemp-

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tion on payment of 2000*l.* and interest on the 22d of December, 1792.

On the 1st of November, 1795, Robert Johnson underlet, to Coll Dillon, part of the lands comprised in the term of 61 years.

Joseph Preston, in consideration of 2000*l.*, the amount of the principal money due to him under the mortgage, by an indenture, dated on the 8th of September, 1804, conveyed and assigned the several lands comprised in the mortgage (including the lands of Rahardevin and Ballyspellan, comprised in the term of 61 years) unto Patrick Walsh, his heirs, executors, and administrators, subject to the payment of the several head rents reserved in the several leases, and also to the proviso for redemption contained in the original mortgage deed of the 22d of June, 1792.

On the 7th of March, 1807, Robert Johnson died, leaving Mary Hughes (the wife of Henry Hughes) and John Conry, his heirs at law; and by his will, bearing date the 25th of September, 1791, after making a devise to William Francis Read (since deceased) and Sir Thomas Fetherston, he devised all his estates in the county of Roscommon, including his equity of redemption of the term of 61 years in the lands of Rahardevin and Ballyspellan, unto the Respondents John Devenish and George Devenish, their heirs, executors, and administrators, as tenants in common: and he devised all his estates in the County of Leitrim, including the lands of Headfort and the other lands comprised in the mortgage, to Francis Fetherston and his heirs; and he appointed Francis Fetherston and John Devenish executors of his will.

Shortly after Robert Johnson's death, his will was proved by Francis Fetherston, who assented to the devise thereby made to the Respondents, John and George Devenish, of the lands of Rahardevin and Ballyspellan, and of the testator's other estates in the County of Roscommon.

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On the 22d of April, 1807, Patrick Walsh filed a bill in the Court of Exchequer in Ireland against Francis Fetherston, John Devenish, George Devenish, Sir Thomas Fetherston, Henry Hughes, and Mary his wife, and John Conry, praying for a foreclosure of the mortgage made by the indenture of the 22d of June, 1792, and assigned to him by the indenture of the 8th of September, 1804.

By an indenture of release and assignment, dated on the 20th of February, 1808, Patrick Walsh in consideration of 2,410*l.*, the amount then due on the mortgage, paid to him by George M'Dermott, conveyed and assigned the several lands and premises comprised in the mortgage, to George M'Dermott, his heirs, executors, and administrators, subject to the head rents payable for such lands respectively, and also subject to the proviso for redemption contained in the original mortgage deed of the 22d of June, 1792.

Dowell O'Reilly died on the 13th of November, 1808, leaving the Appellant, his eldest son; who thereupon became entitled to the reversion and inheritance of the lands of Rahardevin and Ballyspellan, immediately expectant upon the term granted by the lease of the 24th of March, 1781.

On the 16th of June 1809, the cause of Walsh

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against Fetherston and others, came on to be heard in the Court of Exchequer; and by a decree of that date it was referred to the chief Remembrancer or his deputy to take an account of what was due on the mortgage, and also an account of all other charges and incumbrances upon the mortgaged premises.

At the same time Patrick Walsh obtained leave to amend his bill, by adding George M'Dermott as a complainant.

Patrick Walsh died on the 25th of November, 1809; and by his will bearing date the 3d of that month, he appointed the Respondents Gerald Walsh, Hugh Walsh, and Francis O'Beirne, executors thereof; but the Respondents Gerald Walsh, and Hugh Walsh, alone proved his will.

The Respondents, Gerald Walsh, Hugh Walsh, and Francis O'Beirne, together with George M'Dermott, on the 18th of January, 1810, filed a bill, in the nature of a bill of revivor and amendment, in the suit of Walsh against Fetherston and others, and the cause was shortly afterwards revived.

On the 2d of March, 1810, a consent was entered into by Francis Fetherston (the executor of Robert Johnson) and the other parties in the last mentioned cause, that the officer to whom it was referred to take the accounts directed by the decree of the 16th of June, 1809, should report that 2000*l.* was due on the mortgage on the 8th of September, 1804, when the mortgage was assigned to Patrick Walsh, and should compute interest on such sum of 2000*l.* from that day at the rate of 6*l.* per cent. per annum.

On the 6th of April, 1810, Francis Fetherston

entered into a contract in writing with Luke White, for sale to him of the lands of Headfort and other lands in the county of Leitrim, comprised in the mortgage; and on the 1st of May, 1810, Luke White entered into possession of part of the lands, by virtue of his contract.

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The chief Remembrancer or his deputy made his report in the revived cause of Walsh and others against Fetherston and others, on the 28th of April, 1810, and thereby found that the sum of 2,680*l.* 9*s.* 11*d.* was due to the Plaintiffs in such suit, on security of the lands comprised in the mortgage.

On the 10th of June, 1810, George M'Dermott, by a deed of that date, assigned and conveyed the mortgaged premises to the Respondents Gerald Walsh and Hugh Walsh, their heirs, executors, and administrators, subject to the proviso for redemption contained in the original mortgage deed; but the deed of conveyance and assignment was never registered.

On the 12th of July, 1810, Francis Fetherston died intestate, leaving the Respondent Francis Fetherston, (then a minor,) his eldest son and heir at law; and the Respondent Sarah Fetherston, his widow, who shortly after his death obtained letters of administration of his estate and effects.

On the 6th of February, 1811, the Respondents Gerald Walsh, Hugh Walsh and Francis O'Beirne and George M'Dermott, filed a bill of revivor, against the Respondents, Francis Fetherston, and Sarah Fetherston, praying that the suit of Walsh and others against Fetherston and others might be revived against them, as the heir at law and per-

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sonal representative of Francis Fetherston; and the cause was revived accordingly.

In Easter Term 1811, one whole year's rent reserved by the indenture of the 24th of March, 1781, being then due to the Appellant for the lands of Rahardevin and Ballyspellan, he obtained a summons in ejectment from the Court of Common Pleas in Ireland, and served the same on Susannah Fallon, widow (in whom the lease granted by Robert Johnson to Mallachy Fallon deceased, was then vested), and on Coll Dillon, and on Daniel O'Connor, Roderick O'Connor, and John Irvin, the occupying tenants of the lands of Rahardevin and Ballyspellan, and on George M'Dermott, and on the Respondent John Devenish, one of the devisees of the lands under the will of Robert Johnson, and also the surviving executor under that will, and on the Respondent George Devenish, the other devisee of the lands under the same will; and at the same time that the Appellant served such summons in ejectment upon the several persons last mentioned, he gave each of them notice in writing, that such ejectment was brought on account of non-payment of rent.

The ejectment cause came on for trial on 5th of July, 1811, and judgment was given for the Appellant, and entered up accordingly.

On the 10th July, 1811, the cause of Walsh and others against Fetherston and others came on to be heard for further directions on the Remembrancer's report, bearing date the 28th April, 1810: when it was decreed, "that the Defendants in such suit, or such of them as ought so to do, should pay the Plaintiffs the sum of " 2680/ 9s 11d. with interest on the principal sum

“ of 2000*l.*, from the date of such report, making
 “ together with the said sum of 2680*l.* 9*s.* 11*d.* the
 “ sum of 2830*l.* 9*s.* 11*d.* within three months from
 “ the date of that decree, with interest for the
 “ same till paid, and the costs of that suit; or in
 “ default thereof that the lands and premises com-
 “ prised in such mortgage, or a sufficient part
 “ thereof, should be sold for payment of such
 “ principal, interest, and costs :” and this decree
 was afterwards signed and enrolled.

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In the year 1811, a suit was commenced in the Court of Chancery in Ireland, on behalf of the children of Francis Fetherston, against Mr. Luke White, for specific performance of the contract entered into between him and the late Francis Fetherston, for purchase of the lands of Headfort and others in the county of Leitrim (part of the mortgaged lands as before stated), and a decree was made against him in the suit on the 16th of February 1815.

After the judgment in ejectment had been obtained by the Appellant, he and his agent made applications to the tenants of the lands of Rahardevin and Ballyspellan, for payment of the rent which was in arrear; and at the same time informed them, that if such rent was not paid forthwith, together with the costs of the ejectment, the Appellant would take out execution on the judgment. The Appellant on the 26th of August, 1811, applied to the Court of Common Pleas, to issue execution under the judgment: And, the Court, on the 26th of August, 1811, issued a writ of *habere facias possessionem*. In the month of October, 1811, the Appellant delivered the writ to the Sheriff, who exe-

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cuted it on the 18th of that month; and delivered possession of the lands of Rahardevin and Ballyspellan to the Appellant.

By the Irish statute 11 Anne, c. 2, reciting the inconveniences to landlords and lessors from the niceties attending re-entries for non-payment of rent at common law, and the expense of recovering possession of the demised premises by ejectment; the inefficacy of re-entries when legally made, from the practice on the part of lessees of preventing the recovery of possession, by injunctions obtained in Courts of Equity, without security for rents due or accruing, it is enacted (s. 2) that when more than half a year's rent is in arrear upon a lease, the landlord or lessor may without demand or re-entry serve a summons in ejectment for recovery of the demised premises, and upon proof of the fact that more than half a year's rent was due when the summons was served, and that no sufficient distress was to be found on the premises, shall recover judgment and execution, and if the lessee or person claiming under the lease shall suffer judgment to be recovered and execution executed, without paying the rent in arrear with costs, or without filing a bill for relief in equity within six months after execution executed, the lessee, &c. shall be barred from all relief or remedy in law or equity, &c., and the landlord, &c., shall hold the premises discharged from the lease.

The Irish statute 4 Geo. I. c. 5, recites the former statute, (11 Anne, c. 2,) and that it had been a frequent practice for sub-sheriffs and seneschals of manors to take insufficient security upon replevins, by which means landlords have been

put to great trouble, charges, and vexation, in the recovering their rents after judgment obtained in avowry; and that it had been found difficult for landlords to prove the want of sufficient distress, by reason of niceties attending such proof, whereby the former act had proved in a great measure ineffectual; and thereupon enacts (s. 2.) that when one year's rent shall be in arrear upon a lease, although there be sufficient distress upon the land to answer the rent in arrear, the landlord or lessor may serve a summons in ejectment, and upon proof that one year's rent was in arrear and due before the service of the summons, shall recover judgment and have execution; and if the lessee, &c., shall not pay the rent in arrear with costs, to be ascertained as in the act provided, or depositing the same in a Court of Equity, on filing a bill within six months after execution executed, he shall be barred from all relief or remedy in law or equity, other than by writ of error for reversal of such judgment in case the same shall be erroneous, and the landlord shall hold the premises discharged from the lease.

These Acts contain a clause saving the rights of mortgagees of leases who are not in possession.

By the Stat. 8. Geo. I. ch. 2. sect. 4. (Irish Act.) it is declared, "that if the mortgagee of any lease or his assignee shall not within nine months after execution executed, pay or tender to the landlord, the rent in arrear and costs, mentioned in the statutes before referred to, such mortgagee or his assignee shall be barred and foreclosed of all relief or remedy in law or equity on account of his mortgage." But by

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the 5th section of the same statute it is declared,
 “ that all mortgages and assignments of mortgage
 “ shall be registered within six months after per-
 “ fection thereof, or in default thereof that land-
 “ lords may obtain judgment and execution with-
 “ out serving the persons claiming under such
 “ mortgages or assignments with summons in
 “ ejectment.”

In the month of May, 1812, the Respondent Jane Crawford, obtained letters of administration of the estate and effects of Robert Johnson, remaining unadministered by his executors with his will annexed, and on the 17th of June, 1812, an application was made to the Court of Common Pleas in her name, and in the name of her husband the Respondent Hugh Crawford, to set aside the judgment in ejectment and the proceedings thereunder, on the ground that the Respondent Jane Crawford was not served with a summons in the ejectment cause: but the Court refused the application with costs: the Respondent Jane Crawford, not having obtained administration to Robert Johnson, till after judgment in the ejectment suit, and the Respondent John Devenish, the surviving executor of Robert Johnson, having been duly served with a summons in that suit.

On the same day (17th June 1812) Coll Dillon one of the undertenants, applied to the Court of Common Pleas, to set aside the judgment in ejectment and the proceedings thereunder, for irregularity: but that application was also refused with costs.

On the 18th of June, 1812, the Respondent Francis O'Beirne, accompanied by Mr. Jones and ano-

ther person, called upon the Appellant, and Mr. Jones then tendered to the Appellant on behalf of Coll Dillon and Susanna Fallon and the other under-tenants of the lands of Rahardevin and Ballyspellan the sum of 550*l.*; stating at the same time that 400*l.* part thereof was for payment of all rent due for the lands up to the 1st of May, 1812; and that the remaining 150*l.* was to cover the Appellant's costs in the ejectment cause; and Mr. Jones at the same time stated that if the sum of 150*l.* should not be sufficient to cover such costs he would make up the deficiency; and the Appellant having refused to accept the sum of 550*l.*, for or on behalf of the tenants, Mr. Jones then tendered the same to the Appellant in the name of the Respondents Gerald Walsh and Hugh Walsh and Francis O'Beirne, as the executors of Patrick Walsh deceased. The Appellant refused the last mentioned tender also; and Mr. Jones then made a similar tender to him, in the name of the Respondent Jane Crawford; which tender the Appellant likewise rejected.

On the 29th of June, 1812, Coll Dillon and Susanna Fallon, together with the Respondents Gerald Walsh and Hugh Walsh and George M'Dermott, filed a bill of complaint in the Court of Exchequer in Ireland against the Appellant; "praying an account against the Appellant of the
 "rents and profits received by him from the lands
 "of Rahardevin and Ballyspellan since he re-
 "covered possession of such lands as aforesaid,
 "and that the lease of the 24th of March, 1781,
 "might be deemed a good and subsisting lease,
 "and the proceedings under the ejectment be
 "declared fraudulent and void, or that the

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“ Respondents Gerald Walsh, and Hugh Walsh,
 “ and George M'Dermott, or some or one of them
 “ might be decreed entitled to redeem the lands
 “ of Rahardevin, and that the lease thereof might
 “ be decreed a good and subsisting lease as be-
 “ fore such ejectment was brought.”

The Appellant put in his answer to the last mentioned bill; and evidence having been gone into and publication passed, the cause came on to be heard on the 14th of February, 1814; but it was ordered by the Court to stand over, until the Lord Chancellor of Ireland should give his judgment in a case which was stated to be then depending in his Court relative to the construction of the statutes before mentioned.

On the 27th of February, the Plaintiffs in the last mentioned suit obtained an order to amend their bill, by adding the Respondents Hugh Crawford and Jane his wife, as parties; and they amended their bill accordingly, on the 23d of March, 1814.

On the 9th of May, 1817, the Court of Exchequer decreed; “ that the Respondents Gerald
 “ Walsh, and Hugh Walsh, and George M'Der-
 “ mott, were entitled to redeem the lands of Ra-
 “ hardevin and Ballyspellan, on payment to the
 “ Appellant of all rent, and arrears of rent, and
 “ costs at law of the ejectment; but without any
 “ costs in that cause: and the Court accordingly
 “ referred it to the Chief Remembrancer, or his
 “ deputy to take an account of what was due to
 “ the Appellant for such rent, and costs at law;
 “ and also to take an account of what the Appel-
 “ lant made, or without wilful default might have
 “ made of the premises, since he had entered into

“ possession thereof under the execution : and
“ the Chief Remembrancer or his deputy was to
“ set off what he should find due from the Appel-
“ lant, against the sum he should find due to him for
“ rent and costs, and strike a balance : And it
“ was further ordered, that after payment of what
“ should appear due to the Appellant on the
“ account, within three calendar months after the
“ Chief Remembrancer or his deputy should have
“ made his report, the Appellant should deliver
“ up possession of the premises to the Respon-
“ dents Gerald Walsh, and Hugh Walsh, and
“ George M'Dermott, or their assigns ; or in de-
“ fault thereof, that an injunction should issue
“ directed to the Sheriff of the county of Ros-
“ common to put them into possession of the pre-
“ mises : And it was further ordered, that in case
“ the last named Respondents should not, within
“ three calendar months, pay such balance as
“ shall be due to the Appellant for rent and costs,
“ that their bill should stand dismissed with
“ costs : And it was further ordered, that in case
“ the Respondents Gerald Walsh, and Hugh
“ Walsh, and George M'Dermott, should pay
“ the same, they should be entitled to be re-
“ paid by the Respondent Jane Crawford : And
“ in default of payment thereof by her, it was
“ further ordered, that the Respondents Gerald
“ Walsh, and Hugh Walsh, and George M'Der-
“ mott, should be at liberty to tack the same to
“ their mortgage of the lands of Rahardevin and
“ Ballyspellan, together with their costs in that
“ cause : And it was further ordered, that if on
“ taking such account, the balance should appear
“ in favour of the Respondents, Gerald and Hugh

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“ Walsh, and George M'Dermott, the Appellant
 “ should pay them such sum as should be so re-
 “ ported due, within three calendar months after
 “ the chief Remembrancer or his deputy should
 “ have made his report: And it was further
 “ ordered, that so much of the bill as prayed re-
 “ lief on the part of Coll Dillon and the other
 “ under tenants should be dismissed, but without
 “ costs.”

This decree was not signed or enrolled.

On the 25th of June, 1817, the Appellant in-
 formed the Respondents Gerald Walsh, and Hugh
 Walsh, and the said George M'Dermott, through
 their attornies Messrs. O'Beirne and Jones, that
 the Appellant was ready and willing to redeem
 their mortgage, and to pay them the principal
 and interest, and costs on foot thereof, on having
 the mortgage securities assigned to him, or to a
 trustee for him, and at the same time cautioned
 them not to proceed under the decree of the 9th
 of May, 1817.

On the 4th of July, 1817, the Appellant moved
 in the Court of Exchequer that the Respondents
 Gerald Walsh, and Hugh Walsh, and George
 M'Dermott, might be restrained from taking any
 further proceedings in the cause of Dillon and
 others against O'Reilly and others, and that it
 might be referred to the proper officer to take an
 account of what was due to them for principal,
 interest, and costs, the Appellant being ready
 to redeem the mortgage: The Court ordered the
 motion to stand over till the first motion day in
 the following Michaelmas term, and directed the
 officer in the mean time, to take an account of
 what was due to the Respondents Gerald Walsh;

and Hugh Walsh, and George M'Dermott, for principal, interest, and costs on foot of the final decree of the 10th of July, 1811, in the cause of Walsh and others against Fetherston and others, and also on account of what was due to them for costs in the cause of Dillon and others against O'Reilly and others. And the Respondents Gerald Walsh, and Hugh Walsh, and George M'Dermott, were by consent allowed to draw out of Court the sum of 500*l.*, which they had paid in for rent and costs, in the last mentioned cause.

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On the 13th of November, 1817, the Respondents Gerald Walsh, Hugh Walsh, and George M'Dermott, took in their charge under the last mentioned order of reference, in which they did not make any claim in respect of the rents and profits of the lands of Rahardevin and Ballyspellan.

On the 14th of November, 1817, the Appellant served a copy of the last mentioned order, and also a copy of the charge upon Mr. Peter Roe, the attorney of the Respondents, Francis Fetherston, and Sarah Fetherston, and also on the attornies of the Respondents, John Devenish, George Devenish, Jane Crawford, Henry Hughes, and Mary his wife; and the Appellant, at the same time, served them with a written notice that they might attend before the officer, and take such proceedings upon the account, and towards the liquidation of the mortgage debt, as they respectively might be advised, on account of their respective interests.

On the 20th of November, 1817, the chief Remembrancer by his deputy made his report under the order of the 4th of July, 1817, " by which

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“ he found there was due to the Respondents
 “ Gerald Walsh, and Hugh Walsh, and George
 “ M'Dermott, under the decree of the 10th of
 “ July 1811, in the cause of Walsh and others
 “ against Fetherston and others, the principal
 “ sum of 2,830*l.* 9*s.* 11*d.*; and the sum of
 “ 1,083*l.* 9*s.* 8*d.* for interest thereon; and that
 “ the taxed costs, &c., making together the sum
 “ of 4,483*l.* 13*s.* 8*d.*, due to the Respondents
 “ Gerald Walsh, and Hugh Walsh, and George
 “ M'Dermott, on foot of the decree of the 10th of
 “ July, 1811.

By an order made on the 6th of December, 1817, the Respondents Gerald Walsh, and Hugh Walsh, and George M'Dermott, “ were ordered
 “ forthwith to assign the mortgage securities and
 “ the foreclosure decree of the 10th of July, 1811,
 “ to the Appellant or his trustee, on being paid
 “ the sum of 4,483*l.* 13*s.* 8*d.*, reported due to
 “ them, and on being also paid the sum of
 “ 883*l.* 8*s.* 5*d.*, the amount of their costs in the
 “ cause of Dillon and others against O'Reilly and
 “ others.”

Subsequently to the last-mentioned order, the further sum of 33*l.* 8*s.* 4*d.* became due to the Respondents Gerald Walsh and Hugh Walsh for interest on the mortgage, which added to the sum of 4,483*l.* 13*s.* 8*d.*, made the sum of 4,517*l.* 2*s.*; which sum was, at the Appellant's request, advanced and paid by the Respondent John Knox, to the Respondents Gerald Walsh and Hugh Walsh, on the 7th of February, 1818; and at the same time the Appellant paid them the sum of 883*l.* 8*s.* 5*d.*, which added to the sum of 4,517*l.* 2*s.*, made the sum of 5,400*l.* 10*s.* 5*d.*

By an Indenture of Release and Assignment, bearing date the 7th of February, 1818, the Respondents Gerald Walsh, and Hugh Walsh, and George M'Dermott, together with the Respondent Francis O'Beirne (who was named as a co-executor with Gerald and Hugh Walsh in Patrick Walsh's will) at the request of the Appellant, conveyed and assigned, all the lands and premises comprised in the original mortgage, bearing date the 22d of June, 1792, to the Respondent John Knox, his heirs, executors, and administrators, for and during the continuance of the several leases therein, and all renewals of such leases, subject to the payment of the head-rents and renewal fines and performances of the lessees' covenants: And by the same indenture the Respondents Gerald Walsh, and Hugh Walsh, and George M'Dermott, and the Respondent Francis O'Beirne, assigned the decree of foreclosure in the cause of Walsh and others against Fetherston and others, and all benefit thereof, unto the Respondent John Knox, and also the sum of 883*l.* 8*s.* 5*d.*, charged exclusively on the lands of Rahardevin and Ballyspellan under the decree in Dillon and others against O'Reilly and others.

In December, 1818, all the lands and premises comprised in the mortgage of the 22d of June, 1792, except the lands of Rahardevin and Ballyspellan, and also except some of the lands the leases of which had expired, were advertised for sale under the foreclosure decree in the cause of Walsh and others against Fetherston and others, bearing date the 10th of July, 1811.

By a memorandum of Agreement bearing date the 8th of February 1819, and made between

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the Respondent John Knox and the Appellant of the one part, and the Respondent Francis Fetherston of the other part, the Respondent Francis Fetherston, amongst other things covenanted with the Appellant and the Respondent John Knox, that neither he nor any person claiming by or through him, would ever in any manner claim any right of Redemption in the term of sixty-one years in the lands of Rahardevin and Ballyspellan, or any benefit or interest under the decree of the 9th of May, 1817, in the cause of Dillon and others against O'Reilly and others: And he thereby released the Appellant from all claims, and demands, and accounts on foot of the decree, or in anywise connected with the lands of Rahardevin and Ballyspellan: And the Appellant and the Respondent John Knox, covenanted with the Respondent Francis Fetherston, that they would procure the sale of the lands to be postponed till the 17th of May, 1819.

The sale of the mortgaged premises was, at the request of the Respondent Francis Fetherston, and of Peter Roe, postponed by the Appellant and the Respondent John Knox, from time to time, after the 17th of May, 1819, in order to enable the Respondent Francis Fetherston to procure a completion of the contract for sale of part of the mortgaged premises entered into with Mr. Luke White.

In April, 1820, the Respondent Francis Fetherston and the other Plaintiffs in the suit in Chancery, instituted for specific performance of Luke White's contract, applied to the Court to restrain the Respondents Gerald Walsh and Hugh Walsh,

from proceeding under the foreclosure decree of the 10th of July, 1811, to a sale of the lands sold to Luke White.

By an "order in that cause bearing date the 29th of April 1820, on the consent of the Appellant and of the Respondent John Knox, it was directed that the sale under the foreclosure decree should be postponed till the first hearing day after Trinity term then next: and should then take place, unless the Plaintiffs in the suit in Chancery, should by that day procure the Master's report of a good title, free from incumbrances."

The Plaintiffs in the suit in Chancery not having procured the Master's report of a good title by the first hearing day after Trinity term, 1820, the Appellant and the Respondent John Knox, proceeded to sell the mortgaged lands, under the foreclosure decree of the 10th of July, 1811: and on the 27th of June, 1820, the lands were sold: but by an order of the Court of Exchequer bearing date the 1st of December, 1820, obtained on the application of the Respondent, Sarah Fetherston, the sale was set aside, and the same lands were ordered to be again set up for sale by the proper officers.

In pursuance of this order the same lands and premises were again put up for sale on the 20th of January, 1821: and were sold to George Barclay, for the sum of 5,325/.

On the 19th of January, 1821, the Respondent Sarah Fetherston, as administratrix of Francis Fetherston, deceased, filed a bill in the Court of Exchequer, against the Appellant and the Respondents John Knox, Gerald Walsh,

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Hugh Walsh, Francis O'Beirne, and Francis Fetherston; and by subsequent amendment, against the Respondents Hugh Crawford, and Jane his wife: " Praying, that the decrees of the 16th of " June, 1809 and the 10th of July, 1811, in the " cause of Walsh and others against Fetherston " and others, might be set aside, on the ground that " all necessary parties were not before the Court " in that cause: And that the mortgage of the " 22d of June, 1792, might be decreed to stand " as a security only for the principal sum of " 794*l.* 8s. 7d., with interest from the date of the " assignment of such mortgage to Patrick Walsh: " And in case the Court should not set aside the " decrees, then that the Respondents Francis " O'Beirne, Gerald Walsh, and Hugh Walsh, and " the Appellant and the Respondent John Knox, " might be restrained from all further proceedings " under the decree of foreclosure bearing date " the 10th of July, 1811, or under any posting or " sale that had been or should be had under such " decree, until they should have proceeded with " effect under the decree of the 9th of May, 1817, " against the Appellant, for the redemption of the " lands of Rahardevin and Ballyspellan, and for an " account of the mesne profits thereof from the 18th " of October, 1811, until the several accounts directed by the last mentioned decree should be taken pursuant thereto, and until the amount of the mesne profits of the last mentioned lands, whilst in the hands of the Appellant, should be ascertained, and duly accounted for, and fairly set off against the mortgage debt, and possession of the lands of Rahardevin and Ballyspellan restored under the injunction of the Court

“ directed to be issued by the last mentioned decree: and that the Respondent Sarah Fetherston might have time to have the said agreement for sale of the lands of Headfort and other lands therein mentioned (part of the mortgaged lands which were contracted to be sold by Francis Fetherston, deceased, to Mr. Luke White in 1810,) carried into effect, under the decree for that purpose made in the Court of Chancery in Ireland, (on the 26th of February, 1815), she undertaking to pay what might be due under the decree of the 10th of July, 1811, out of the purchase money.”

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On the 20th of February, 1821, the Court made an order in this cause “ that the Respondent Sarah Fetherston should have an injunction, to stay the proceedings of the Plaintiff in the cause of Walsh and others against Fetherston and others, until the hearing of the present cause or further order, the Respondent Sarah Fetherston undertaking to speed her cause, and also consenting, if the mortgage should be ultimately established, that whatever sum should appear due thereon at the date of that order, should be considered a consolidated sum, and carry interest with it, although not directed by the decree of the 10th of July, 1811, in the said cause of Walsh and others against Fetherston and others.”

The cause was heard on the 6th, 12th, and 16th of July, 1824; when amongst other things it was decreed, that the Respondent Sarah Fetherston was entitled to have the accounts taken which were directed by the decree made on the 9th of May, 1817, in the cause of Dillon and others against O'Reilly and others, with costs as to the

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“ Respondents the executors of Walsh, to be paid
 “ by the Respondent Sarah Fetherston, and ac-
 “ cordingly it was referred to the chief Remem-
 “ brancer or his deputy, to take an account of
 “ what was due to the Appellant for rent and ar-
 “ rears of rent and costs at law of the ejectment
 “ in the pleadings mentioned, but without any
 “ costs in the said cause of Dillon and others,
 “ against O'Reilly and others, pursuant to the
 “ said decree of the 9th of May, 1819; and
 “ also to take an account of what the Ap-
 “ pellant had, or without wilful default might
 “ have made, of the said lands of Rahardevin and
 “ Ballyspellan, since he entered into possession
 “ thereof under the *habere* in the pleadings men-
 “ tioned: And, that the Chief Remembrancer or
 “ his deputy should set off such sum or sums as
 “ he should find due by the Appellant in such ac-
 “ count, against such sums as in taking said ac-
 “ count should appear due to the Appellant for
 “ such rent and costs as aforesaid, and strike a
 “ balance, &c.: And it was further ordered, that
 “ the Respondent Sarah Fetherston should be at
 “ liberty to proceed on the several accounts
 “ therein-before directed to be taken in her
 “ own name as Plaintiff in this cause, and that
 “ the Appellant and the Respondents Francis
 “ O'Beirne, General Walsh, Hugh Walsh, and
 “ John Knox, should forthwith stop from any fur-
 “ ther proceedings on foot of the said decree of
 “ foreclosure of the 10th of July, 1811; or upon
 “ any postings or sale that had been or should be
 “ made under such decree, until the said several
 “ accounts should be taken, pursuant to the said
 “ decree of the 9th of May, 1817, as thereby di-
 “ rected: And that the Respondents the execu-

“tors of Walsh should have their costs in the
 “present cause against the Respondent Sarah
 “Fetherston, and that the consideration should
 “be reserved, whether the Respondent Sarah
 “Fetherston should recover against the Appel-
 “lant any and what part thereof, save such part
 “thereof as related to the impeachment of the
 “mortgage of the executors, which costs should
 “be borne by the Respondent Sarah Fether-
 “ston.”

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The appeal was against this decree.

For the Appellants.—

The Respondent Sarah Fetherston was not a party to the cause of Dillon and others against O'Reilly and others, in which the decree of the 9th of May, 1817, was made. The equity of redemption of the lease which was subsisting at the time when execution was executed under the judgment in ejectment hereinbefore stated, became in effect from that time vested absolutely in the Appellant, by virtue of the statutes; and was not restored to or re-vested in the evicted lessees by any subsequent act of the mortgagees, or of the Appellant.

The Respondent Sarah Fetherston, who claims merely as administratrix of Francis Fetherston, the devisee and vendor of part of the mortgaged premises, cannot in any view of the case be entitled to the relief given by the decree.

For the Respondent it was contended that the redemption by the mortgagee within the nine months set up the lease to all intents and purposes, so that the lessee and his representatives

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were entitled to the benefit of it, and had a right to carry on the account directed in the suit between the representatives of the mortgagee and the landlord.

For the Appellants.—*Mr. Horne* and *Mr. B. Parry*.

For the Respondent.—*The Solicitor General* and *Mr. Mc. Arthur*.

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The Lord Chancellor.—The question in this case turns principally upon the construction of what are called the Irish Tenantry Acts. The earliest of those Acts was passed in the 11th year of the reign of Queen Anne, the second in the 4th of George the First, and the third in the 8th of George the first. By the effect of those acts if a year's rent is in arrear, and judgment in ejectment has been recovered by the landlord, and execution has been executed upon such judgment, if the tenant does not within the period of six months pay the amount of rent that is in arrear, his right is for ever barred, and the landlord is by the Act of Parliament entitled to hold the premises discharged from the lease. There is in the Act of the 4th of George the First, as well as in the previous Act of the 11th of Anne, a saving of the rights of mortgagees. Afterwards, in consequence probably of some inconvenience resulting from this general saving of the rights of mortgagees, a clause was introduced into the subsequent Act of the 8th of George the First, for the purpose of limiting the mortgagee's right to redeem. By that Act it is provided that if within a period of nine months after the landlord has

taken possession under the writ of execution upon the judgment, the mortgagee does not pay the amount of rent in arrear, together with the costs, then under such circumstances the mortgage right is for ever barred, and the landlord is declared to be entitled to hold the land freed from the mortgage, and the equity of redemption.

The question arising under these Acts of Parliament in this case, is of this description: namely, whether where the tenant omits to pay the rent within the period of six months, but the mortgagee afterwards pays the rent and the costs after the expiration of the six months, and before the expiration of the nine months, the continuance of the lease thereby created for the benefit of the mortgagee enures also for the benefit of the lessee; a question of general interest and importance. It is perfectly clear that the lease continues for the benefit of the mortgagee; it is his legal estate; it is the security for his debt. If then the lease is declared to continue for that purpose, and to have effect and operation in consequence of the rent and the costs having been paid, it is extremely difficult to understand how the lease, can under such circumstances have continuance, effect, and operation for one purpose, and not have continuance, effect and operation for all purposes.

If the mortgagee enters into possession of the premises that were demised, what would be the effect as far as related to the express covenants in the lease with respect to the relation of the landlord and the tenant? Would the lessee under such circumstances be bound by his express covenants? I find nothing in the Act of Parliament

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at all tending to release him under such circumstances from his covenants, and it would be extraordinary that he should be bound by his covenants, and yet that the lease so far as respects him and his interests should not be continued.

It is stated in the Acts as far as relates to the interests of the tenant, that the landlord shall hold the land freed from the lease; and it is contended therefore that if the landlord is to hold the land freed from the lease as far as the tenant is concerned, the right of the tenant never can again be set up in consequence of the payment of rent by the mortgagee. But the provisions of the Acts must be taken together. The Act of 4th of George the First, with respect to the clause to which I have referred, must be taken also in relation to the last clause, by which the rights of the mortgagees are reserved; and this clause must be considered connected with the provisions of the Act of the 8th of George the First. Now it is clear, that the clause cannot be taken literally, because that would defeat the right of the mortgagee; the security is the lease, and for the purpose of securing his interest, the lease must have continuance, and therefore the Act cannot be literally construed, that the landlord is to hold the land discharged from the lease. I think the true construction is, that when there is not a mortgage, if the money has not been paid within six months, in that case the landlord holds the land entirely freed from the effect of the lease, and if there is a mortgage, and it is not paid within nine months, he holds the land freed from the operation of the lease as it respects both the tenant and the mortgagee.

It is said in the argument, that the effect of the Acts was to transfer the equity of redemption from the lessee to the landlord. Now I apprehend if that had been the intention of the legislature, the legislature would have expressed it in clear and distinct terms ; but not only is there no provision to that effect, but so far from there being any provision to that effect, so far as the Act goes, it has a directly contrary tendency ; for the language of the Act of the 8th of George the First is, that if the money be not paid within nine months of the prescribed time, the landlord shall hold the land freed from the mortgage and the equity of redemption ; thereby implying that if the money be paid within nine months, both the mortgage and the equity of redemption shall continue in force against him ; so that not only is there no provision for transferring the equity of redemption from the tenant to the landlord, but so far as the provisions of the Act go, they have a directly contrary effect. The force of those provisions was felt strongly at the Bar, and attempts were made to get rid of the effect of those words, "equity of redemption," by referring to other parts of the Act from which, to infer that the Act had been carelessly and loosely framed, and that a different interpretation ought to be given to those words than their ordinary meaning. But the terms "equity of redemption" are so well known in the law as connected with mortgages, which are the subject of decrees in Courts of Equity, that it is impossible to suppose that a misapprehension could have existed at the time, and it is impossible therefore to construe the Act other-

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wise than by giving to those words their legal and ordinary import and meaning.

It was asked during the argument, why six months was to be assigned for the redemption by the lessee, and nine months to be assigned for the mortgagee? If it was intended that the payment by the mortgagee was to have the effect of continuing the lease, the periods would probably have been co-extensive; but it appears to me very easy to explain the reason why this difference of terms was assigned. It was the duty of the tenant in the first instance to pay the amount in arrear; the mortgagee might not at first be apprised whether he would make the payment or not; he might expect that he would, and therefore might not himself be prepared to make the payment in the event of the tenant failing to do so: it was considered reasonable, therefore, I presume, that a certain time should be allowed to the tenant; and if he did not make the payment, then, that the mortgagee should have a reasonable time after that failure by the tenant within which he should on his part make the payment. The construction I put upon these statutes appears to me to be a very reasonable construction, and is free from many of these anomalies and difficulties to which the opposite construction would lead. If the tenant pays the amount of the rent in arrear, together with the costs within the period of six months, the landlord sustains no injury, and beyond that time a further period is allowed in the case of the mortgagee; and if the mortgagee pays the rent in arrear within nine months, together with the costs, the landlord has all he has a right to claim. It

does not appear to me that there is any inconvenience in the construction; it is nothing more than the effect of extending with respect to the claims of the mortgagee the period from six to nine months, within which the rent and costs are to be paid.

It was suggested that a noble and learned Lord who formerly held the office of Lord Chancellor of Ireland, had expressed a different opinion with respect to the construction of these Acts: I refer to my Lord Redesdale. Undoubtedly in the case of *Nesbit v. Tredennick*,* he did intimate a different opinion, but that opinion formed no part of his judgment in the cause. After the cause was heard, and when he pronounced his judgment, he carefully abstained from delivering any opinion with respect to the construction of those Acts: it was not necessary for the decision of that case, and when this case was argued during the last session at your Lordships' bar, that noble and learned Lord was present during a part of the argument; he read the papers, he attended to the subject, he informed me that he considered it a case of great importance, requiring much consideration, and was very far from entertaining that view of it

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* 1. Ball and Bently, 29. The case was heard before and decided by Lord Manners. It was a case in which a new lease had been obtained by a mortgagee of a leasehold interest, which had been evicted for non-payment of rent, after the expiration of the six and nine months allowed to the lessee and mortgagee to redeem, by Stat. 8 Geo 1. c. 2, s. 4, but in pursuance of a contract entered into in the period between the six and nine months, if the parties interested did not redeem: The Court held that this was not a graft upon the former lease, nor a trust for the lessee; the mortgagee not being in possession nor procuring the lease behind the back of the lessee.

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at the period to which I am referring, which he is conceived to have held at the time when the judgment in *Nesbit v. Tredennick* was pronounced. We have unfortunately lost the benefit of valuable assistance by the death of that distinguished individual.

It was thought also that the opinion of Lord Chancellor Manners tended to the opposite construction of those Acts of Parliament. That noble and learned Lord was present, I believe, during the whole of the argument. I have had an opportunity of conversing with him upon the subject, and so far from entertaining a different opinion, he has authorized me to state that he entirely concurs in the construction I have felt it my duty to put upon these Acts.

If your Lordships shall adopt the opinion I have expressed respecting the construction of these Acts, the rest of the case will admit of little doubt or difficulty. In this case the representatives of the mortgagees, within nine months, tendered the amount of the rent in arrear, and the costs. A bill was filed, and that money was paid into Court. A decree was obtained in that suit, and after the proceedings had arrived at this position, an agreement was entered into between the landlord on the one side, and the representatives of the mortgagee on the other, the object of which was to defeat the claims of those who were interested under the lease. The circumstances connected with this part of the transaction are detailed very particularly in the proceedings on your Lordships' table. I have read them with attention, and am satisfied the Court below acted correctly in refusing to sanction or support such an agree-

ment, the object of which was to defeat, for the benefit of the landlord, the claims of those interested under the lease. The question, therefore, at last comes to the decree which was ultimately pronounced in the month of July, 1824. By that decree the Plaintiff in this cause Sarah Fetherston, was declared by the Court to be at liberty to proceed in taking the accounts in this cause, which were directed under the previous decree of the 9th of May, 1817, in the other cause. It appears to me, that this decree of the 16th of July, 1824, was perfectly correct, for the object of that decree was to take the account between the landlord and the persons interested under the lease, and it is clear that the other questions never could be properly adjusted until those accounts had been previously taken. Under these circumstances I should recommend to your Lordships to affirm the decree of the Court below.

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Judgment affirmed

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(COURT OF CHANCERY.)

THE AMICABLE SOCIETY for a PER- } *Appellants.*
PETUAL LIFE ASSURANCE OFFICE }

JAMES BOLLAND, JOSEPH HARE, } *Respondents.*
and MATTHIAS KOOPS KNIGHT }

In the year 1815, a contract, called a policy of insurance, was made by F. with the Amicable Insurance Company, by which F. agreed to pay 128*l.* 15*s.* yearly to the Society, according to the provisions of the bye-laws, and in consideration of these payments F. was admitted a member of the Society, who bound themselves and their successors to pay to the executors, administrators, or assigns of F. such a share of the joint-stock as should become due upon his death, according to the charters and bye-laws of the Society. The annual payments were made by F. to the Society for ten years. In 1820, F. assigned all his interest under the policy, without consideration, upon certain trusts for a nominee in the indenture of assignment. In 1824, F. was convicted of felony and executed, having the day before his conviction been declared a bankrupt. Upon a bill filed by his assignees against the Society, the nominee, and the trustees, claiming the benefit of the policy: Held in the Court below that they were entitled to the relief prayed. But this decision was reversed on appeal, upon the ground, that the contract was against public policy, and must be considered and construed as if a clause had been inserted in terms insuring against the event of the commission of a capital felony by the party insured.

IN Hilary term, 1825, the Respondents filed a bill in the Court of Chancery against James Cathrow Disney, and Ann Nelson his wife, Sir Everard

Home Bart., Joseph Birch, Jedediah Kerie, and the Appellants, stating, (among other things) that for many years previous to, and in September, 1819, Henry Fauntleroy carried on the trade and business of a banker, in partnership with William Marsh, Josias Henry Stracey, and George Edward Graham, under the style and firm of Marsh, Stracey, Fauntleroy, and Graham :—

That in the month of January, 1815, Henry Fauntleroy effected an insurance upon his life, with the Appellants, the incorporated Society for the insurance of lives, called “ The Amicable Society for a Perpetual Assurance Office,” which policy bears date the 11th of January, 1815, whereby, after reciting that Henry Fauntleroy had paid to the Society the sum of 25*l.*, by way of premium on his admission, and the further sum of 128*l.* 15*s.* as the first yearly payment of the annual sum of 128*l.* 15*s.*, which Henry Fauntleroy had agreed to pay yearly to the Society, according to the provisions of the bye-laws of the Society, it was witnessed, that in consideration of the premises Henry Fauntleroy was thereby admitted a member of the Society on, Nos. 6025, 6026, 6027, 6028, 6029, 6030, 6031, 6032, 6033, 6034, 6035, 6036, 6037, 6038, 6039, 6040, 6041, 6042, 6043, 6044, 6045, 6046, 6047, 6048, 6049; and the Society thereby bound themselves and their successors to pay to the executors, administrators or assigns of Henry Fauntleroy, such a proportion or share of the joint-stock and fund of the Society as should become due upon the death of Henry Fauntleroy, according to the charters and bye-laws of the Society :—

That such policy of assurance was signed by—

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the directors, and sealed with the seal of the Society, and Henry Fauntleroy from the time of the making of such policy of assurance until the time of his death, regularly paid the premiums as they became due upon the policy of assurance, and that such policy of assurance was, at the time of his death, a valid and subsisting policy of assurance, and that there was then due and payable thereon, or in respect thereof, according to the charters and bye-laws of the Amicable Society, a sum of money, amounting to 6000*l.* and upwards :

That Henry Fauntleroy being so possessed of and entitled to the said policy of assurance, some time in the month of January, 1820, executed an indenture bearing date the 10th day of September, 1819, and which was made and executed by and between Henry Fauntleroy on the one part, and Sir Everard Home, Baronet, and Joseph Birch, Esq. of the other part, whereby, after reciting the policy of assurance, and that Henry Fauntleroy had agreed with Sir Everard Home and Joseph Birch to assign all his right, title, and interest in the policy, and the money secured thereby, and to become due thereon upon his death, it was witnessed, that in pursuance of the agreement, and in consideration of 5*s.* to Henry Fauntleroy, paid by Sir Everard Home and Joseph Birch, Henry Fauntleroy bargained, sold, and assigned the policy of assurance, and all sums of money secured thereby, or to become due thereon, and all his estate, and interest, &c., to have, receive, take, keep, possess, and enjoy the policy, and sums of money and premises, unto Sir Everard Home and Joseph Birch, their executors, ad-

ministrators, and assigns, thenceforth as to and for their own proper estate, goods, chattels, monies, and effects :—

That Sir Everard Home and Joseph Birch, executed a declaration of trust, bearing date the 19th of September, 1819, whereby they declared that the before written assignment was made to them in trust for the benefit of Ann Nelson Macnamara, otherwise Cathrow, commonly called Cathrow, whose maiden name was Ann Nelson Peele, and that they would stand possessed of the policy and all benefit and advantage to arise therefrom, in trust, for the sole and separate use and benefit of Ann Nelson Macnamara, for her own sole and separate use and benefit, notwithstanding her coverture with her present or any future husband, and free from his and their debts, control, or engagements; and that the receipt and receipts of Ann Nelson Macnamara, should be a good and sufficient discharge for any money arising therefrom, and that the policy, and all benefit and advantage to arise therefrom, should be at the absolute disposal of Ann Nelson Macnamara, by deed, will, or in any other manner she should think fit; and Henry Fauntleroy thereby covenanted with Sir Everard Home and Joseph Birch that he would pay the annual sum of 128*l.* 15*s.*, according to the terms of the policy :—

That Henry Fauntleroy at or about the same time signed a memorandum, which was in the words and figures following: “ Memdum. This
“ assignment was given to Sir Everard Home and
“ Joseph Birch, in trust, to pay Ann Nelson Ca-
“ throw the proceeds upon my decease. (Signed,)
“ H. Fauntleroy, Berners Street, September, 10th,

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“ 1819.” That the person in the said instrument described as Ann Nelson Macnamara, was, at the time of the execution of the instrument, the wife of the defendant James Cathrow Disney. That Henry Fauntleroy never received, or agreed or intended to receive any valuable consideration for the assignment of the policy of assurance, but the assignment was purely voluntary on his part, and it was intended by him either that the policy of assurance so assigned should be held in trust for himself and as he should direct, or that the same should be held for the benefit of Ann Nelson Cathrow, as a present and voluntary assignment from him :—

That on the 16th of September, 1824, a commission of bankrupt issued against William Marsh, Josias Henry Stracey, and George Edward Graham, under which they were found and declared to be bankrupts, and the Respondents were chosen assignees of their estates and effects, and the usual bargain, sale, and assignment thereof were made to them accordingly ; and on the 29th of October, 1824, a commission of bankrupt issued against Henry Fauntleroy, under which he was found and declared to be bankrupt, and all the estate and effects of Henry Fauntleroy had become vested in the Respondents as his assignees under such commission :—

That Henry Fauntleroy died on the 30th day of November, 1824, and the monies secured by the policy of assurance thereby became payable.

Upon this statement of facts it was (among other things) prayed by the bill that the assignment of the policy of assurance might be declared to have been void, or might be set aside, and that

the Respondents might be declared to be entitled to the policy of assurance and the money then payable thereon, and that it might be ascertained what was then payable upon the policy of assurance, and that the Appellants might be decreed to pay what was so due to the Respondents, and that James Cathrow Disney and Ann Nelson his wife, and Sir Everard Home and Joseph Birch, might be decreed, if necessary, to assign the policy to the Respondents, and to deliver up the same to them, and to do all necessary acts to enable the Respondents to receive what was then due thereon.

On the 13th of May, 1825, the Appellants put in their answer, whereby (among other things) they admitted the insurance, and the payment of the premiums due thereon up to and until the 11th day of January, 1824, and that the policy was a valid and subsisting policy, up to the 30th of October, 1824, or up to the 23d day of October, 1824, being the first day of the session, at which Henry Fauntleroy was tried and convicted. That in case the policy of assurance was a valid and subsisting policy at the time of the death of Henry Fauntleroy, there was then due thereon, according to the charters and bye-laws of the Amicable Society, a large sum of money, which they believed would amount to 6000*l.* or thereabouts.

The Appellants also admitted by the answer, the execution of the indentures of the 10th of September, 1819, and the 19th of September, 1819, that Henry Fauntleroy, at or about the same time signed a memorandum to the purport or effect in the bill mentioned. They also admitted the bankruptcies

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of the firm, and of Fauntleroy, and his death; but they contended, that the money secured by the policy of assurance did not thereby become payable, and that the Respondents were not, as assignees of Henry Fauntleroy, entitled to the policy of assurance and to the money payable thereon.

The Appellants also by their answer stated, that the Society was first incorporated by letters patent under the Great Seal of England, bearing date at Westminster the 25th day of July, in the fifth year of the reign of Queen Anne, and in the year of our Lord, 1707, whereby the Queen granted that William, then Lord Bishop of Oxford, and the other persons therein named, and all and every other person and persons who should be admitted to be a subscriber and subscribers, according to the directions thereafter contained, not exceeding 2000 persons in the whole, should be and be called one body corporate and politic in deed and in name, by the name of "The Amicable Society for a Perpetual Assurance Office;" and the Queen also granted, amongst other things, that all and every other person or persons who thereafter should be admitted members of the Society according to the powers and authorities thereby granted, should be and be esteemed members of the same corporation thereby constituted: and that after the fifth year, to be computed from the 25th of March, 1707, 10,000*l.* of lawful English money and so much more as should be agreed on by a majority of the members for the time being, assembled in a general court, should be annually paid and equally divided among the nominees of the members who should die in every year then next ensuing, their respective execu-

tors, administrators or assigns, and that the remainder of the monies which should be contributed and paid as therein mentioned, together with such interest, increase or improvements as should arise, accrue or be made thereof or thereby, or should arise or be received for annuities to be granted by the Society to their own members only, should be reserved and improved by the Society for a Perpetual Assurance Office, for the sole use and benefit of all and every the members of the same corporation, according to their respective interests therein.

That by other letters patent under the Great Seal of Great Britain, bearing date at Westminster, the 30th day of October, in the forty-eighth year of the reign of King George the Third, and in the year of our Lord, 1807, after partly reciting or taking notice of the former letters patent, and two subsequent charters granted to the Society, it was among other things granted and ordained, that if any other person who thereafter should be admitted a member of the Society, or should be a contributor thereto, should make or sign, or cause, or willingly or wittingly permit to be made and signed, any false or fraudulent representation or declaration, in order to become a member thereof or contributor thereto, or should refuse or neglect to pay his or her contribution according to the bye-laws, rules and orders made or to be made in the General Courts of the Society, or should break any of the conditions which in his or her policy should be specified, every such person, and his or her executors, administrators, or assigns, should be absolutely excluded from the Society, and from all benefit under such policy; and it was also granted, directed and ap-

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pointed that seven-eighth parts of the annual contributions, which should become due in every year, and should be actually paid by or on account of all and every person and persons who should thereafter become a member or members of the Society, should be equally divided amongst and duly paid to the nominees of the members of the Society, who should die in every year, their respective executors, administrators or assigns, together with such part of the annual contributions of the members of the Society, admitted under the charters, and so much more as should be agreed upon by the members of the Society for the time being, or the major part of them, as should be present in general courts to be from time to time assembled, and as was directed by the same charters, according to the original plan of the Society; and that the remaining eighth-part of the monies which should be so contributed and paid, together with such interest, increase and improvements, as should accrue or be made thereof, or be received or retained for annuities to be granted by the Society, and all other monies which should be received by or on account of the Society, should be reserved and improved for the sole use and benefit of the members, according to their several interests therein.

The Appellants then by their answer, after setting forth other letters patent regulating the dividend, further said, that Henry Fauntleroy at the general sessions of the peace, held in and for the City of London, which commenced on the 23rd day of October, 1824, was indicted for felony, and was on the 30th day of that month, tried for and convicted of felony, and afterwards received judgment of death and was executed for the same;

and submitted that upon the attainder of Henry Fauntleroy for felony, he ceased to be a member of the Society, by reason whereof and also by reason that the death of Henry Fauntleroy was the direct consequence of, or was occasioned by his own felony, no claim could be made upon the Society, upon or by virtue of the policy of assurance, and, that although they were ready and willing to pay what might be due on the policy to any person or persons legally entitled to receive the same, yet that as a corporate body, they were bound to raise and submit the question to the judgment of the Court, inasmuch as the legal representatives of the other members of the Society, who died in the same year as Henry Fauntleroy might be interested therein; and the Appellants submitted to the judgment of the Court, whether, under the circumstances, his Majesty's Attorney-General, ought not to have been a party to the suit.

By an order dated the 6th of June, 1825, the bill was amended by striking out the name of the defendant, Jedediah Kerie.

The cause being at issue, it was agreed between the Respondents and the Appellants that a copy of policy of insurance should be read and given in evidence on the part of the Respondents on the hearing of the cause; that the Respondents were the assignees of the estate and effects of Henry Fauntleroy in the policy named, under and by virtue of a commission of bankrupt awarded and issued against Henry Fauntleroy, under which he was duly found and declared bankrupt, and his estate and effects were duly assigned to the Respondents on the 29th day of October, 1824; that Henry Fauntleroy, from the time of making the policy.

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up to and until the 11th day of January, 1824, or some person on his behalf, regularly paid the premiums as they became due on the policy : that the printed copies of the several charters, letters patent and bye-laws of the Appellants, the Amicable Society for a Perpetual Assurance Office, should be read and given in evidence on the hearing of this cause without further proof : That Henry Fauntleroy was convicted of felony on the 30th day of October, 1824, and was executed on the 30th day of November, 1824, in pursuance of such conviction and the judgment of death thereupon pronounced upon him : That a copy of the record of the indictment and conviction should be read and given in evidence on the hearing of the cause, without further proof, and that Henry Fauntleroy named in the indictment and conviction was the Henry Fauntleroy named in the pleadings of the cause, upon whose life the insurance mentioned in the pleadings was effected.

The Respondents having settled with the claimants under the indenture of the 10th day of September, 1819, and obtained an assignment of the policy, the cause came on to be heard, on the 21st day of May, 1827, before the Master of the Rolls ; when the following documents were read, viz., the policy of insurance, the commission of bankrupt issued against Henry Fauntleroy, and the assignment dated the 29th day of October, 1824, a book marked with the letter A, containing printed copies of the several charters, letters-patent and bye-laws of the Appellants, a copy of the record of the indictment and conviction of Henry Fauntleroy, marked with the letter B ; and it being admitted by the Respondents and the

Appellants that Henry Fauntleroy, from the time of making the policy up to and until the 11th day of January, 1824, or some person on his behalf, regularly paid the premiums as they became due on the policy; and that the said Henry Fauntleroy was convicted of felony on the 30th day of October, 1824, and was executed on the 30th day of November, 1824, in pursuance of such conviction; and that the Henry Fauntleroy named in the indictment and conviction, was the Henry Fauntleroy named in the pleadings of the cause; and the Respondents by their counsel undertaking to pay the costs in the suit of the Defendants James Cathrow Disney and Ann Nelson his wife, Sir Everard Home and Joseph Birch, it was ordered by the decree that the Respondents' bill should stand dismissed out of the court as against the last-mentioned Defendants with costs; and it was declared that the Respondents as assignees of Henry Fauntleroy, were entitled to the policy of assurance, and the money then payable thereon: and the Appellants by their counsel admitting that the sum then payable upon the policy amounted to the sum of 6,084*l.* 7*s.* 6*d.*, it was ordered and decreed that the Appellants should pay to the Respondents the said sum of 6,084*l.* 7*s.* 6*d.*

The decree was passed by the Register of the Court on the 8th of November, 1827, and was duly signed and enrolled. On the 17th of November, 1827, the Appellants gave notice in writing, to the solicitor for the Respondents, of the intention of the Appellants to appeal from the decree.

By an order bearing date the 4th of December, 1827, made by the Vice Chancellor on the appli-

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cation of the Respondents, it was ordered that the Appellants do, within a month, pay to the Respondents the sum of 6,084*l.* 7*s.* 6*d.*

On the 22d of December, 1827, the Appellants applied to the Lord Chancellor to suspend the proceedings under the decree and the last mentioned order until the hearing of this appeal to the House of Lords. But the application was refused.

On the 9th of January, 1828, the Appellants, in obedience to the decree and the order of the 4th of December, 1827, paid to the Respondents, the sum of 6,084*l.* 7*s.* 6*d.*, as the money then payable upon the policy.

The appeal was against the decree of the 21st of May, 1827.

For the Appellants.—*Sir C. Wetherell*, and *Mr. Rose*.

The insurance was effected by Henry Fauntleroy upon his own life, which life ceased in consequence of his wilful violation of the law; and it is against the general policy of the law, as well as established principles, that either the insured, or those claiming in his right, should recover for a loss caused solely by the criminal act of the insured himself. Insurance is legally defined to be a contract, in which the insurer, in consideration of a premium equivalent to the risk run, undertakes either against probable perils and losses, or against a certain event as in the case of death, but uncertain, as to the period of its taking place. If the insured, therefore, can at any time by his own act determine the event, it is against the essence of the contract; and much more is it so,

if that act (as in the present instance) be felonious; which the law always considers wilful.

Henry Fauntleroy ceased to be a member of the Amicable Society, which is a corporation established by royal charter, upon his attainder by the judgment which preceded his execution; and, therefore, at the time of his death he had no interest in the funds of the Society.

Fauntleroy, by the effect of the contract of insurance, became a member of an incorporated partnership, the object of which, according to the recital and substance of the charter, went to provide a maintenance for the widows, children, or relatives of the members, upon the casualty of death; and it would be a fraud upon the partnership if any partner by his own act could create a demand upon the funds which was never contemplated in the contract. The contract was in the nature of a wager upon an uncertain event. The risk insured was the chance of death in the ordinary course of events. The risk upon which the claim arises is the chance of escape upon the commission of a capital felony, which in effect is not a chance, but a certainty in the eye of the law, and death which is the punishment is the act of the guilty party; for the punishment follows as a necessary consequence of the crime, and the criminal must intend the consequence when he does the act. At all events, the risk (if it be one) of death in consequence of the commission of a capital felony, is not the risk insured, but a different one, depending on the will of one of the parties to the contract, which cannot be so construed as to leave it in the option

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of either party to determine the event. The principles of law established in marine insurances, are applicable to this case. In policies upon ships, if the loss is not the direct and immediate consequence of the risk insured,* or if the owner destroys the ship, or it perishes by his default,† or in cases of smuggling, commerce with the King's enemies, deviation, or detention for attempting to violate the law of nations, nothing can be recovered on the policy. So would it be on policies of insurance against fire, if the house were purposely burnt by the party insured. If insurance against such an event could be deemed a part of the contract, a risk insured within the intention of the parties, then it is an illegal wager, a contract the performance of which no court of justice will enforce.‡ If the commission of felony were supposed to be the risk insured, the death would only be the consequence of the risk, which according to the cases would not be within the terms of the policy.¶ If insurance against death, as a felon or traitor, had been inserted in the policy, it would have been clearly illegal as contrary to public policy. By the attainder, Fauntleroy ceased to be a member of a corporation established by royal charter, and at the time of his death he had no interest in the funds of the Society. Finally, the Respondents could not recover as assignees of a person, all whose property and rights of action have, by

* *Jones v. Schmoll*, 1 T. R. 130, case in note.

† *Malyne Lex Merc.* 149.

‡ *Simpson v. Bloss*, 7 T. R. 246.

¶ *Lockyer v. Offley*, 1 T. R. 156. *Jones v. Schmoll*, *quâd* *suprà*.

attainder vested in the Crown, without office found.*

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For the Respondents.—*The Solicitor General* and *Mr. Koe*.

If it is admitted that the policy was valid until the attainder, the act of felony alone is not the ground of avoidance, since attainder might never have ensued upon the act. If the commission of the felony does not abrogate the contract, how can the attainder or the execution have that effect? It is absurd to suppose that the party intended to be hanged, and if the felonious act itself is not sufficient to annul the contract, the argument from public policy is inapplicable.

Since this event the Society have by their contract provided by an express clause, that the policy shall be void if the assured dies by the hands of justice. This shows at least their apprehension and construction of their own contract, if not the practice in former times. The cases of insurance against maritime risks, bear no analogy the present. If there is a deviation for instance, it is not the voyage insured, and so of the other instances. But here death is the event which constitutes the risk. It is argued that the party has accelerated the event by his own act, but that is frequently the case in all these insurances; persons insured often engage in unwholesome occupations

* *Bullock v. Dodds*, 2 B. and A. 258. Mr. (now Sir George) Rose, in arguing the case for the Appellants, cited the celebrated passage from Cicero, (ad Brut. Ep. 12) "Nec vero me fugit quam sit acerbum parentum scelera filiorum pœnis lui; sed hoc præclare legibus comparatum est, ut caritas liberorum amiciores parentes Reipublicæ redderet."

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which shorten life; they accelerate the event by hard drinking, or hard labour, by vice or exposure. Were these acts ever contemplated as grounds to question the validity of a policy? It does not follow of necessity that the party will be hanged for the felony; he may escape, or be pardoned. Suppose the sentence had been commuted for transportation, and the convict transport had been wrecked, and the party had perished in it, would the policy then have been valid? Upon what ground would it have been deemed invalid? The property in a policy of assurance upon life, is a property increasing in value from year to year as the premiums are paid, and it is transmissible and purchased daily as property by assignment, even by the insurance companies themselves. This property was assigned by Fauntleroy before his attainder, and before the act of felony, and the Society would have purchased the interest of his assignee, at its value, the day before the attainder.

The Lord Chancellor.—The circumstances of the case are shortly these: In January, 1815, Henry Fauntleroy insured his life with the Amicable Insurance Society. In the month of May in the same year he committed a forgery on the Bank of England. He continued to pay the premiums upon this insurance for a considerable period of time. In the year 1824, he was apprehended, and on the 29th of October in that year he was declared a bankrupt, and an assignment of his effects was made to the Respondents. On the following day, the 30th of October, he was tried for this forgery; he was found guilty, sentenced

to death, and in the month of November following was executed.

The question under these circumstances is this: whether the assignees can recover against the Insurance Company the amount of this insurance; that is to say, whether a party, effecting with an insurance company, an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether, under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the Noble Lord * now present, and we have both come to the conclusion that the assignees cannot maintain this suit.

It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had ben insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition, that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes? namely, the interest we have in the welfare and prosperity of our connexions. Now, if a policy of that description, with such a form of condition

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inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went at least, altogether void?

Upon this short and plain ground, therefore, independently of the more complicated arguments referred to by the counsel at the bar, in the discussion of this case, I think that this policy cannot be sustained, and that the Respondents are not entitled to recover. I submit, therefore, that the judgment of the Court below ought, under these circumstances, to be reversed.

Judgment reversed.

ENGLAND.

(COURT OF KING'S BENCH.)

THE KING - - - - - *Plaintiff in Error.*WESTWOOD - - - - - *Defendant in Error.*

To an information in the nature of a *quo warranto* against W. a Burgess of the Borough of Chepping Wycombe, the Defendant in two of his pleas stated a custom, under which, the Mayor and common council of the corporation, by right, elected the burgesses. By a third plea a charter was set forth granted by Charles II., whereby he ordained that one of the most honest and discreet of the burgesses should be elected as in the letters patent directed to be Mayor, and two honest and discreet burgesses to be bailiffs, and twelve discreet burgesses, residing in the borough, to be aldermen; that the Mayor, bailiffs, and burgesses of the borough, and their successors, or the major part of them, should from time to time for ever, elect such other men as to them should seem most expedient, to be burgesses, and that the aldermen and bailiffs, should be and be called the common council of the borough, and that the Mayor, aldermen and bailiffs for the time being, &c., should have power, from time to time, to make such reasonable laws, statutes and ordinances, as to them should seem good and necessary, according to their sound discretion, for the good rule and government of the burgesses, artificers, &c., inhabitants of the borough, and for declaring in what manner the members of the corporation and inhabitants of the borough should behave and conduct themselves in their offices, mysteries, and businesses, and for the good rule and victualing the borough, and for letting the borough lands, and other matters concerning the borough, and that they should have power to impose fines for non-compliance with the bye-laws. The plea then set forth the manner prescribed by the charter for electing the Mayor and bailiffs. The plea then stated the acceptance of the charter, and that in the year 1675, the then Mayor, bailiffs, and burgesses made a bye-law,

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(not extant in writing) that from thenceforth the Mayor and common council of the borough, or the major part of them, should by themselves, and without the concurrence of the other burgesses, choose such persons as they should think fit to be burgesses of the borough, which bye-law had ever since been observed, and was still in force. The plea then stated that W. had been elected according to the bye-law.

By replications to the first and second pleas, the charter was set out, and it was averred that according to the charter, the burgesses had ever since been eligible and of right ought to have been elected by the Mayor, bailiffs, and burgesses at large: To the third plea a general demurrer was put in.

The rejoinder alleged that the charter was not duly accepted as to that part which directed that the Mayor, bailiffs, and burgesses, &c., should elect burgesses. To this there was a special demurrer, on the ground that a charter could not be accepted in part without special authority for such partial acceptance.

The Defendant joined in demurrer, and upon argument judgment was given for the Crown upon the first and second pleas, and for the Defendant upon the third.

Upon a writ of error against the judgment upon the third plea, it was held, affirming the judgment of the Court below, that the bye-law stated in the third plea was legal and valid.

THE question in this case related to the constitution* of the corporation of Wycombe, and arose upon a demurrer to a plea, and was in effect whether a bye-law, made by the whole body of a corporation restricting the right of electing burgesses to a select body of the corporation was valid; the charter by which the corporation was created or continued having provided that the election should be in the whole body.

In Hilary term, 1819, a motion was made i

* See the note at the end of the Case.

the Court of King's Bench, upon the affidavit of a burgess and an inhabitant, for a rule to show cause why an information, in the nature of a *quo warranto*, should not be filed against Thomas Westwood, the Defendant in error, to show by what authority he claimed to be one of the burgesses of the borough.

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No cause being shown against this rule, it was made absolute, and in Easter term of the same year, an information was filed against the defendant, to which he put in four pleas,—the first, of an ancient custom for the mayor and common council of the borough to elect the burgesses; the second, third, and fourth, being in substance the same, founding the right of such election upon a presumed bye-law.

Issues were taken to these several pleas, and on the trial of the same at the Bucks Midsummer Assizes, 1821, a verdict was found for the Defendant generally, upon all the issues.

In Michaelmas term, 1821, an application was made to the King's Bench to set aside this verdict, on the ground of all the issues being found for the defendant, which was manifestly wrong, as the issues were inconsistent, and that the jury should have given their verdict for the defendant on one plea only, inasmuch as his election could only have been made according to one of the modes pleaded. The Court granted this application as to the issues upon the first and second pleas, with liberty to each party to amend their pleadings without costs. The Defendant accordingly put in the following amended pleas:

The first plea stated, that Chepping Wycombe had been a borough from time immemorial, and,

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that during all that time there have been within the borough a mayor, two bailiffs, and an indefinite number of burgesses, of which burgesses there have been twelve, sometimes called principal burgesses, sometimes capital burgesses, and for a long time and now called aldermen, who, together with the bailiffs of the borough for the time being, have been a common council to assist the mayor : that from time immemorial there hath been an ancient and laudable custom within the borough, that the mayor and common council for the time being, or the major part of them duly assembled together for that purpose, have from time to time by themselves, and without the concurrence and assistance of the rest of the burgesses, nominated and elected such person or persons to be a burgess or burgesses of the said borough, as to them, the mayor and common council for the time being, or the major part of them so assembled together, hath seemed meet, and that the Defendant was duly nominated and elected pursuant to the said custom, and duly admitted into the office of burgess.

The second plea was the same in substance as the first, but stated generally, that immemorially there had been, and ought to be, and was, a common council, without stating how it was constituted ; and that there was a custom for the mayor and common councilmen to elect burgesses, and stated the Defendant's election by the common council.

The third plea alleged, that the borough of Chepping Wycombe had been from time immemorial an ancient borough ; and that long before and at the time of granting the letters-patent thereafter mentioned, the burgesses of the said

borough were a body politic and corporate, called and known by the name of the mayor, bailiffs, and burgesses of the borough of Chepping Wycombe, and that from time immemorial there had been an indefinite number of burgesses within the said borough, and that King Charles II., in the fifteenth year of his reign, did, by letters-patent, grant, ordain, constitute, and confirm to the said mayor, bailiffs, and burgesses, that there should thenceforth be one of the most honest and discreet burgesses, to be elected in manner in the letters-patent mentioned, to be mayor; two honest and discreet burgesses to be bailiffs; and twelve discreet men, continually residing in the said borough, who should be called aldermen; and that the mayor, bailiffs, and burgesses of the borough, and their successors, or the major part of them, from time to time for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting, within the said borough, as to them should seem most expedient, to be burgesses of the said borough; and the said King did thereby grant and confirm unto the said mayor, bailiffs, and burgesses, that the said aldermen and bailiffs should be and be called the common council of the borough; and that the mayor, aldermen, and bailiffs of the said borough, and their successors for the time being, or the major part of them, (of whom the mayor for the time being the said late King willed to be one,) might and should have full power and authority to frame, constitute, ordain, and make, from time to time, such reasonable laws, statutes, and ordinances whatsoever, as to them should seem to be good,

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wholesome, useful, honest, and necessary, according to their sound discretion, for the good rule and government of the burgesses, artificers, &c., inhabitants of the borough aforesaid, for the time being, and for declaring in what manner and order the aforesaid mayor, aldermen, bailiffs, and burgesses, and the artificers, inhabitants, and residents of the borough aforesaid, should behave, conduct, and carry themselves in their offices, mysteries, and businesses, within the said borough and the limits thereof, for the time being, and otherwise, for the further good and public advantage and rule of the said borough, and the victualling of the said borough; and also for the better preservation, government, disposition, letting, and demising of lands, tenements, possessions, revenues, and hereditaments, to the aforesaid mayor, bailiffs, and burgesses, and their successors, by the said letters-patent, or otherwise given, granted, assigned, or confirmed, or thereafter to be given, granted, or assigned, and other matters and causes whatsoever, touching or in anywise concerning the said borough, or the state, right, and interest of the same borough: and that the mayor, aldermen, and bailiffs should have power to impose fines for non-compliance with their bye-laws.

The plea then recited part of the charter, nominating the first officers of the borough, and set out the mode of electing them in future as follows:—"And the said late King, by his said letters-patent, for himself, &c., further granted and confirmed, that the said mayor, bailiffs, and burgesses of the borough aforesaid, for the time being, or the major part of them, from time to time for

ever thereafter, might and should have power and authority, yearly and every year, on the Thursday next before the feast of Saint Michael the Archangel, to assemble themselves, or the major part of them, in the Guildhall of the borough aforesaid, or in any other convenient place within the borough, to be limited and assigned according to their discretion, and there to continue until they, or the major part of them there then assembled, should choose, elect and nominate one of the aldermen of the borough aforesaid, to be mayor of the borough aforesaid for one whole year then next ensuing; and that then and there they should and might be able to elect and nominate, before they should from thence depart, one of the aldermen of the borough aforesaid, for the time being, who should be mayor of the borough aforesaid for one whole year then next ensuing; and that he, after he should be so elected, before he should be admitted to execute the same office, should take a corporal oath, (within a certain time,) before the mayor, his last predecessor, if present,—or, if he should be absent, then before such of the aldermen and the rest of the burgesses who should be present,—faithfully to execute the same office: And his said late Majesty King Charles the Second, by his said letters-patent, for himself, his heirs, and successors, for ever granted and confirmed to the aforesaid mayor, bailiffs, and burgesses of the borough aforesaid, and their successors, that the mayor, aldermen, and bailiffs of the borough aforesaid for the time being, or the major part of them, from time to time for ever thereafter, might and should have power and authority yearly and

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every year, on Thursday next before the feast of the Annunciation of the blessed Virgin Mary, to assemble themselves, or the major part of them, in the Guildhall of the borough aforesaid, or in any other convenient place in the borough aforesaid, to be limited and assigned according to their discretion, and there to continue until they, or the major part of them there then assembled, should elect and nominate two bailiffs of the borough aforesaid, for one year then next ensuing: and that they, after they should be so elected, before they should be admitted to execute the same office, should (within a certain time) take a corporal oath before the mayor, or in his absence, before the bailiffs, their last predecessors, or either of them, in the presence of such of the aldermen and the rest of the burgesses who should there be present: And his said late Majesty King Charles the Second, by his said letters patent, for himself, his heirs and successors, further granted to the said mayor, bailiffs, and burgesses of the borough aforesaid, that if any or either of the aldermen of the borough aforesaid, should die, or be removed from his office, (which said aldermen, and every, or any of them, not well behaving themselves in the said office, his said late Majesty willed to be removable, at the pleasure of the mayor of the borough aforesaid, and the major part of the aforesaid aldermen of the said borough for the time being,) that then the mayor, and such of the residue of the aldermen of the borough aforesaid, who should be assembled in the Guildhall of the borough aforesaid, or in any convenient place within the borough aforesaid, to be limited and assigned according to their

discretion, or the major part of them so assembled, at the pleasure of the mayor, and the residue of the aldermen of the same borough, should and might be able to elect and prefer one or more of the best and most honest burgesses of the borough aforesaid, in the place or places of the same alderman or aldermen of the borough aforesaid so dead or removed from his or their office or offices, to supply the aforesaid number of twelve aldermen of the borough, the person so elected to take the oath before the mayor, or before the bailiffs, or either of them, as by the said letters-patent now remaining of record in the High Court of Chancery appears."

The plea then averred, that the charter was duly accepted, and that afterwards, to wit, on the first day of December, 1675, the then mayor, bailiffs, and burgesses of the said borough, being in due manner met and assembled for that purpose within the said borough, did then and there duly make a certain ordinance, or bye-law, (not now extant in writing,) for the better rule and government of the said borough, touching and concerning the election of the burgesses of the said borough for the time then to come, in order to avoid popular confusion and disorder in such elections, by which said ordinance or bye-law it was ordained and established in manner following,—that is to say, that from thenceforth the mayor and common council of the borough, or the major part of them duly assembled together for that purpose within the said borough, should and might, from time to time, and at all times thereafter, by themselves, and without the concurrence or assistance of the rest of the burgesses

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of the said borough, select and choose such person or persons to be a burgess or burgesses of the same borough, as to them the said mayor and common council of the said borough for the time being, or the major part of them so assembled as aforesaid, should seem meet; and which said ordinance or bye-law hath ever since the making thereof hitherto been constantly kept and observed by the said mayor, bailiffs, and burgesses of the said borough, and is still in force. The plea then stated the election of the defendant according to the bye-law.

There were replications putting in issue several of the facts alleged in the pleas, and then a special replication to the first and second pleas, setting out the charter of the fifteenth of Charles the Second, whereby it was granted that the mayor, bailiffs, and burgesses, and their successors, or the major part of them, from time to time for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the borough aforesaid, as and which to them should seem most expedient, to be burgesses of the said borough; and averred, that under and by virtue of the said letters-patent, the burgesses of the borough continually, from and after the granting thereof hitherto, have been eligible and of right ought to have been elected from time to time by the mayor, bailiffs, and burgesses at large of the said borough, or the major part of them, and not otherwise. General demurrer to the third plea.

Rejoinder, (after praying that the charter might be enrolled, by which it appeared to contain at the end a general confirmation of all liberties,

franchises, immunities, privileges, &c., before vested in the corporation,) that the said letters-patent were not duly accepted by the then mayor, bailiffs, and burgesses of the said borough, as to that part thereof, whereby his late Majesty King Charles the Second did will and ordain, that the mayor, bailiffs, and burgesses, of the same borough, and their successors, or the major part of them, from time to time for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the borough, as and which to them should seem most expedient, to be burgesses of the said borough.

To this rejoinder there was a special demurrer, assigning for causes, that the defendant has not, in his rejoinder, stated or set forth any charter or letters-patent, or other matter of record, dispensing with a total acceptance of the said letters-patent, and also because he had stated and alleged the supposed partial acceptance of the said letters-patent, as a matter of fact, triable by the country, instead of stating and setting out therein, as he ought to have done, the charter or other matter of record (if any) authorising such supposed partial acceptance. The defendant joined in demurrer.

The case was argued in the King's Bench in Michaelmas Term, 1824, and in 1825, the Judges differing in opinion, the case stood over to Michaelmas Term 1825, when they delivered their reasons *seriatim*, and judgment was then given for the Crown on the two first pleas, and for the Defendant on the third, the effect of which was to annul the custom and establish the bye-law.

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Against the judgment on the third plea, a writ of error on the part of the Crown, was carried to the House of Lords, and there argued * in 1829, by *Scarlett*, for the Crown, and by the *Solicitor-General* and *Patteson* for the Defendant in error. At the conclusion of the argument, the Lord Chancellor said, that the Judges being agreed on the first question, the partial acceptance of the charter, it would only be necessary to put to them for their consideration the question as to the validity of the bye-law, and he would request them to consider that question as embracing, as well the general power to make bye-laws, as the particular objects and provisions of the bye-law in question.

The question was then, upon the motion of the Lord Chancellor, put to the Judges, whether the bye-law contained in the third plea, regard being had to the terms of the charter of the borough of Chepping Wycombe, was a legal and valid bye-law?

Upon this question, the Judges differed in opinion, and on the 16th of February, delivered their opinions *seriatim*.

J. Parke, J.—The question which your Lordships have been pleased to state for the opinion of the Judges, as it appears to me, may be conveniently divided into two branches; and I propose to consider, first, whether this bye-law would have been good if the charter of Charles the Second, mentioned in the pleadings, had given no power of making bye-laws to the select body? And, 2dly,

* The arguments are omitted, because all the points and authorities are noticed in the opinion delivered by the Judges.

whether the provisions of that charter in this respect destroy the power of making this bye-law, which the corporation at large would otherwise have possessed? Now nothing is more clearly settled, than that it is a legal incident to every corporation, that it should possess the power of making bye-laws, regulations, or ordinances, relative to the purposes for which such corporation is instituted, and that power is *primâ facie* to be exercised by the body at large. The authorities for that are the Sutton's Hospital Case, 10th Co., 30 b., *Corporation of Feltmongers v. Davis*, 1 Bos. and Pull., 100. The body at large, therefore, must in this case be taken to have originally possessed that power; and it is stated in the plea to which your Lordship's question refers, that "the mayor, bailiffs, and burgesses at large of the borough of Chepping Wycombe, being in due manner met and assembled together for that purpose within the said borough, did then and there duly make a certain ordinance or bye-law for the better rule and government of the said borough, touching and concerning the election of the burgesses of the said borough for the time then to come, in order to avoid popular confusion and disorder in such elections, by which said ordinance or bye-law it was ordained and established in the manner following,—(that is to say)—that from henceforth the mayor and common council of the borough, or the major part of them, duly assembled together for that purpose within the said borough, should and might from time to time and at all times thereafter by themselves, and without the concurrence and assistance of the rest of the burgesses of the said borough, elect

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and choose such person or persons to be a burgess or burgesses of the same borough, as to them, the said mayor and common council of the said borough for the time being, or the major part of them so assembled as aforesaid, should seem meet." The first part of the question relates to the legality and validity of this bye-law, and it is fit we should look at the authorities. It is decided in the Case of Corporations, 4 Co. 77 b, by all the judges, "after great deliberation and conference had amongst themselves, that such ancient elections were good and well warranted by their charter and by the law also; for in every of their charters they have power given them to make bye-laws, ordinances, and constitutions, for the better rule, government, and order of their cities or boroughs, by force of which, and for avoiding popular confusion, they, by their common assent, constitute and ordain that the mayor, or bailiffs, or other principal officers, shall be elected by a select number of the principal of the commonalty, or of the burgesses as is aforesaid, and prescribe also how such selected number shall be chosen; and such ordinance or constitution was resolved to be good and allowable, and agreeable with their law and their charters for avoiding popular disorder and confusion." The same doctrine, has been established and supported by all the subsequent decisions upon the subject from that period down to the present time. In the case of The Corporation of Colchester, in the 3d Bulstrode, 71, it was held by Lord Coke and the whole Court, "that if there be a popular election of the mayor and aldermen in corporation towns, and this happens to breed

confusion among them, this may be altered by their agreement, and by the common consent of all, to have their elections made by a fewer number, but not otherwise." The same doctrine is laid down by Chief Justice Eyre, in *Reg. v. Larwood*, in Comberbach's Reports, p. 316, and by Lord Hardwicke, in *The King v. Tomlyn*, in the cases temp. Hard. 316. It was also admitted in the Maidstone cases, (*The King v. Spencer*, 3 Burr. 1827, and *The King v. Cutbush*, 4 Burr. 2205); and the two cases of *The King v. Bird*, and *The King v. Ashwell*, in the 12th East, 22, and 13th East, 367, are authorities to the same effect, and fully establish the legality of a bye-law, made by the body at large, limiting the exercise of the power of election to part of the burgesses themselves. It must therefore be considered as a settled rule, that the whole body at large may, by such a bye-law, delegate the power of electing corporate officers to a part of themselves.

It would be dangerous to the peace and security of many corporations to break in upon this rule. But it is said there is a difference between elections of corporate officers where there is a definite number and whose places are merely to be filled up, and of electing burgesses whose number is indefinite, and that the bye-law, though reasonable in the former, is in the latter case unreasonable, and that its tendency is to diminish the number of burgesses, and to keep it below that of the common council, so as to vary the constitution of the borough. I do not, however, think, that it is the necessary consequence of such a bye-law that the number of burgesses will be

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diminished. It may or may not happen, that the body to which the power is delegated will limit the number of ordinary freemen; if they do so improperly, it is in the power of the majority to limit the bye-law and put a stop to the mischief; and it may be observed, that there is as much chance at least that the burgesses at large, if there were no bye-law, would, in order to make the franchise of each more valuable, permit the number of ordinary freemen to be reduced.

But in fact, in the case of *The King v. Bird*, it was held by the Court of King's Bench that the rule was as applicable to the election of the lower as of the higher officers of the corporation. It has been said, indeed, that the bye-law for the election of burgesses might be good in that case, as the same mischief would not result from it, because, by the constitution of the particular borough in question in that case, persons had inchoate rights by birth and servitude, and these persons were sufficient to provide for the succession in the corporation. But that circumstance makes no difference as it seems to me in the principle of the bye-law,—it only diminishes the degree of mischief arising from its adoption. If it be bad, where the only supply is by the election of burgesses, because it has a tendency to diminish that supply,—it must be bad for the same reason, if that be only one of the sources, for it tends to diminish it: it is equally mischievous in its principle, and equally a violation of the spirit of the constitution of the borough, if it improperly affects any means provided by that constitution for the continuance of the succession of members. My opinion, therefore, is, that a bye-

law by the burgesses at large, delegating the right of election to a select number of themselves, is as valid in point of law where it relates to the election of freemen as to that of officers, and that it makes no difference, whether the election of freemen be the only means of continuing the corporation or not.

The remaining consideration upon this branch of the question is this, whether the persons, on whom the bye-law in the present case confers the right of election, are a part of the burgesses at large, so as to bring this case within the rule above laid down? The bye-law confers it on the mayor and common council,—that is, the mayor, two bailiffs, and twelve aldermen; all these officers are taken mediately or immediately from the burgesses, and in construction of law still continue burgesses: the aldermen when elected are still burgesses, though they are also clothed with additional authority, and have in their character of aldermen functions to perform, which the common burgesses do not possess. In the meeting of the whole body they are burgesses only. If they are absent, the proceedings are valid, and, if present, they act and vote as burgesses only. A delegation of this authority to the common council is a delegation to the mayor, bailiffs, and twelve burgesses, in other words, to a part of the burgesses at large. The bye-law in question is for these reasons, in my opinion, legal and valid, if the body at large had at the time of making it the power of making it.

This brings me to the second branch of the question, which is, whether the provisions of the charter of Charles the Second destroy the power

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of making this bye-law, which the burgesses at large would otherwise have possessed? And this, it must be confessed, is a point of more doubt than the former; but on the best consideration I have been able to give it, my opinion is, that since the acceptance of that charter, no other persons than the select body could make bye-laws,—at least bye-laws relative to elections,—and consequently that the burgesses at large were not competent to make this. The power of making bye-laws is incident to a corporation; that is, when the Crown creates a corporation it grants to it, by implication, all the powers that are necessary for carrying into effect the objects for which it is created, and securing a perpetuity of succession upon the legal principle which is expressed in the maxim, “*qui concedit aliquid concedere videtur et id sine quo concessio est irrita—sine quo res ipsa esse non potuit.*”

A discretionary power, somewhere, to make minor regulations, usually called bye-laws, in order to effect the objects of the charter, is necessary, and is therefore implicitly granted by the Crown; and if no select body is appointed to exercise it, this discretionary power must be in the body corporate at large; but though it is necessary that there should be a power to make bye-laws in general, it is not necessary that there should be a power to make any particular bye-law, still less to make this bye-law, or any one of a like nature, delegating the power of election from all to a part. Such a bye-law, indeed, is reasonable, and may therefore be valid; but it is not essential or necessary to a corporation that it should be made, or that there should be in that corporation

the power to make it. Will it be said, that the power to make such regulations is essentially necessary to the existence of a corporation? There are many corporations which exist and are carried on without it, and I cannot see any reason why it should be so considered. If then such a power be not essential and necessary, it would not exist by necessary implication in the body at large of a corporation which the Crown should create for the first time, when by the charter it expressly gives the power to the select body to make bye-laws generally without restriction. In such a charter, the express power given to a select body to make bye-laws, would be inconsistent with the power to make bye-laws by the body at large; and this affirmative power, therefore, would, in legal language, toll the implied power incident to the corporation; in other words, no power to the corporation at large would pass by implication by the King's grant. I concede that the select body would have no right to make this ordinance, or any other of the same sort, by which the common burgesses would be deprived of the right of voting, which is given by the charter to them, upon the principles laid down in the Maidstone cases, to which I have referred. But unless it is necessary and essential to a corporation that a bye-law of that nature should be made, or that there should be power to make it, it does not follow that the whole body should have it; and, as I think I have shown, that it is not essentially necessary, it follows, by clear and direct inference, that the whole body would not have it. And if the general body of burgesses would not possess this power in a corporation newly erected, by

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such a charter, giving an unlimited power to make bye-laws,—and the above ground of the affirmative power in such a case implies a negative of all others,—it follows, that if a prescriptive or existing corporation accept a charter with such a provision, the power already belonging to the entire corporation would cease, and as I said, it would be just as inconsistent in this as in the other supposed case, that there should be two bodies at the same time, in the same corporation, possessing the same power.

It is this inconsistency or implied negation, which appears to me to distinguish this case from the cases cited in argument at your Lordships' bar, and likewise in the Court below. In the case referred to in 1st Rolle's Abridgment, p. 513, title Corporations, (G) pl. 5, there was a clause in the charter, declaring that on the death or amotion of any alderman, it should be lawful for the mayor and the rest of the aldermen, within eight days after his death, to elect another into his place; and it was said, that though there be no election within the eight days, yet they may elect at any time afterwards, for they have a power of election as incident to the corporation, and that it is necessary it should exist in order to carry the purposes of the charter into effect. So in the case of *The King v. Bird*, in the 13th East, the right given affirmatively by prescription to apprentices to be admitted burgesses was not inconsistent with the charter, and therefore did not destroy the implied right of the corporation to continue itself by election. In Haddock's case,* the charter contained no provisions inconsistent with the prior existing right in the corporation to remove officers

* 1 Vent. 355.

for misconduct, and therefore the right remained.

For the position I have laid down, there is the authority of Lord Mansfield, in the case of *The King v. Head*, 4 Burr. 2515, who states, that the body at large had no power to make bye-laws, because that power was by the charter given to the common council, consisting of the mayor and aldermen, and the common council could not by a bye-law take away from the body at large the right of election which the charter had vested in the whole body. It is true that the case was decided on another point; but the opinion there given appears to me to be founded on the clearest principles. For these reasons I conclude, that if a new charter, giving to a particular body the power of making bye-laws generally, be accepted by an existing corporation, it takes away the right of making such bye-laws, which it previously possessed. But if the new charter gives only the power to the select body of making them in certain particular cases, or on certain particular subjects, it takes away the right in those particular cases and on those particular subjects only; but it does not take away from the whole body the power of legislation on those subjects, with respect to which it gives the power to a part. The question, then, resolves itself into this, whether the charter referred to does give to the common council a right to make bye-laws in all cases and on all subjects, or, in all cases touching the elections of burgesses, or on the subject of election of burgesses, (for the reasoning in that case would be precisely the same,) or in certain particular cases only, and on certain subjects not including those elections?

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This is a question of construction, and like all cases of the same nature, different minds may form different opinions: It appears to me, however, upon the best consideration I have been able to bestow upon it, that the Crown meant by that charter, to give a general power as to all corporate matters (elections included) to the select body,—but at all events, a power to make bye-laws on the subject of the election of burgesses. The words of the charter are these: “And further, we will and by these presents, for us, our heirs and successors, grant to the aforesaid mayor, bailiffs, and burgesses of the borough aforesaid, and their successors, that the mayor, bailiffs, and twelve capital burgesses aforesaid, and their successors for the time being, or the major part of them, (of whom the mayor for the time being we will to be one,) may and shall have full power and authority to frame, constitute, ordain, and make such reasonable laws, statutes, and ordinances whatsoever, which to them shall seem to be good, wholesome, useful, honest, and necessary according to their sound discretions, for the good rule and government of the burgesses, artificers, and inhabitants of the borough aforesaid for the time being, and for declaring in what manner and order the aforesaid mayor, bailiffs, and burgesses, and the artificers, inhabitants, and residents of the borough aforesaid, shall behave, carry, and use themselves in their offices, mysteries, and business, within the same borough; and the limits thereof for the time being; and otherwise for the farther good, and public utility, and rule of the same borough, and the victualling of the same

“ borough, and also for the better preservation, go-
 “ vernment, disposition, letting, demising of lands,
 “ tenements, possessions, revenues, and heredi-
 “ taments, to the aforesaid mayor, bailiffs, and
 “ their successors, by these presents or otherwise
 “ given, granted, assigned, or confirmed, or here-
 “ after to be given, granted, assigned, and other
 “ things and causes whatsoever, touching, or in
 “ anywise concerning the borough aforesaid, or
 “ the state, right, and interest of the same bo-
 “ rough.” The charter appears to contain the
 entire scheme for the government of the borough.
 This particular provision gives them power to re-
 gulate persons, not being members of the cor-
 poration, such as artificers and residents in the
 borough; to make regulations touching other
 matters for the benefit of the borough, as victual-
 ling of the borough, and for that purpose express
 provision was necessary, for no such power would
 be implied or authorized by the general words;
 and that consideration accounts for the introduc-
 tion of these subjects by name. This provision
 also expressly gives, what would otherwise have
 been incident to a corporation at large, the
 power to regulate the lands of the body; and per-
 haps the particular mention of this subject was
 made in order to avoid doubt whether the general
 words which are used would have been sufficient
 to meet them.

But the mention of these particulars appears
 to me in no way at all to control or affect the
 construction of the other very large and compre-
 hensive words used by the charter; and I cannot
 help thinking that the Crown certainly meant to
 authorize the select body to make bye-laws gene-

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rally, relative to the corporation, or at least relative to the corporate character, and relative to the duties of burgesses in making elections of burgesses and corporate officers. The clause in question empowers this body to make laws, statutes, and ordinances for the good rule and government of the burgesses, artificers, and inhabitants of the borough aforesaid, for the time being, and for declaring in what manner and order the aforesaid mayor, bailiffs, and burgesses, and the artificers, inhabitants and residents of the borough aforesaid, shall conduct and carry themselves, in their offices, mysteries, and business within the same borough and the limits thereof, for the time being, and otherwise for the further good and public utility of the same borough. I own, it appears to me very difficult to say what regulations for the conduct of the corporation itself, and its members in all cases are not authorized by those words; for the corporation is created expressly for the better government, rule, and improvement of the borough: And whatever ordinances are made for the good conduct and efficiency of the ruling body, may, in a sense be considered for the good and public advantage and rule of the borough. But can there be any reasonable doubt that these large words authorize an ordinance regulating the mode of corporate elections? Is not such an ordinance for the good rule and government of the burgesses, and for the public advantage and rule of the borough? In the case of corporations, which has been already referred to, my Lord Coke expressly says that a bye-law similar to that in this case may be made, where, by the terms of their charter, the body at

large have the power given to them to make laws, ordinances, and constitutions for the better government and ordering of cities and boroughs. And the very bye-law stated in the third plea, is expressly stated to be made for the better rule and government of the said borough, touching and concerning the election of burgesses of the said borough. Besides, it is by no means clear that the words, which give a power to make statutes declaring in what manner the burgesses shall conduct themselves in their offices, do not give a power to make a bye-law, directing how they were to conduct themselves in that part of their office, which relates to the election of new burgesses. At all events, I am satisfied that all such regulations would be authorised by the general concluding words, which give them a power to make bye-laws on "all other matters and causes whatsoever, touching or in anywise concerning the said borough, or the state, right, and interest of the same." And it is, as I think, impossible to say, that a regulation of the governing body does not touch or concern the borough, or its state, right, and interest. And if the select body have power to make regulations generally, or regulations touching elections, it is clear, if I am right in the reasons I have before given, that the body at large have none. In order to try the question of the construction of the language of the charter in this respect, let us suppose that a bye-law was made by the mayor and common council, authorizing the election of the burgesses to be made in the Town-Hall after a week's notice, and requiring that the names of the candidates should be previously published, in order

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that their characters and qualifications might be enquired into; and let us further suppose, that the only question was, as to the validity of such a bye-law; would any doubt be entertained by any Court, that the words of the charter authorizes the select body to make such a bye-law? If it is clear that they did, it is equally clear that the same body, by the same means, has a power to make all reasonable bye-laws on that subject, and it follows, that the burgesses at large, have none. For these reasons, I am of opinion, that after the acceptance of the charter of Charles II., the body at large who did make, had no power to make any bye-law upon the subject of elections, consequently not the bye-law in question, and therefore, that bye-law is illegal and invalid.

Mr. Baron Vaughan.—The question proposed is, whether the bye-law contained in the third plea is a legal and valid bye-law? It appears to me that, having regard to the mode in which a bye-law is authorized to be made by this corporation in that plea mentioned, as well as to the object of the bye-law in question, it is not a legal and valid bye-law. Now in considering the validity of this bye-law, there are two questions that present themselves; first, Whether the body at large had authority, consistently with the terms of the charter, to make any bye-law? secondly, admitting their authority, Whether the making this bye-law, the object and purpose of which was to delegate the power of electing burgesses (which by the charter is given to the body at large) to the mayor and common council only, so as to make the election by the mayor, bailiffs and aldermen, of the same validity as an election by the

mayor, bailiffs, and burgesses at large, was a legal act or not? Although I think there can be no doubt, that the body at large had no power to make the bye-law, of the validity of which we are called upon to give our opinion, yet, as the form of the question proposed to us respects both points, I shall therefore address myself to the consideration of them.

The objection which presents itself to my mind, and which I have not been able to overcome, is that the power of making bye-laws is, by the terms of this charter itself not vested in the body at large. At common law all corporations, whether existing by charter or by prescription, are the creatures of his Majesty, and every corporation has a power incident to it of making reasonable bye-laws for their order and government; and if the charter confers no express direction on the subject, that power must be considered, in judgment of law, as residing in the body at large. Several cases may be referred to upon that, but one will be found in Rolle's Abridgment, 513, title Corporation. G, where it is said, if the King create a corporation of a mayor and eight aldermen, and do not give an express power of electing another to the place, yet the power of election is incident to the corporation, and they may elect another in his vacancy. Corporations are at all times subject to the laws of the realm, and are subordinate to them. This position is further confirmed in the case of *The City of London v. Vanacker*, in the 1st Lord Raymond, 496. In addition to the authority of my Lord Raymond, the same principle will be found recognized by a series of other authorities which it is not necessary to mention in detail; so that in every corporation there is

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vested by implication the power of making such bye-laws as are found requisite for managing and ordering the borough. Considering, therefore, this point,—and waiving the question whether the effect of expressly giving a power of making bye-laws to a particular body does not repeal the implied power, or whether the implied power still remains in the body at large,—the conclusion to which my mind arrives, after much time and careful consideration, is, that wherever a charter confers an express power of making bye-laws, as to a particular subject, on a certain part of the corporation, (more especially where, as in this case, those terms are very general and comprehensive,) there is no ground on which a presumption can be raised of an implied power existing in the body at large; but that such power is expressly excluded from that body, according to the rule *expressum facit cessare tacitum*. I think this conclusion is founded on reason and authority.

It is not to be forgotten in construing a charter, that a charter is an emanation from the grace and favour of the Crown, and is always to be considered as expressing the intention of the royal will; and when a corporation have once accepted a charter, they are to be considered, as adopting the form of government therein described, and as pledging themselves to execute the will of the Crown in all the terms and conditions of the charter, as far as they are consistent with the law; and that it was competent to the Crown, if it so pleased, to have limited the power to the common council or the select body, wholly excluding the interference of the burgesses at large.

Now regard being had to the charter itself,

it must be observed, that there are very large and extensive terms in which this power of making bye-laws is given for the maintenance, order, and good government of the borough; that power is not confined to a particular object, or to be exercised only on particular occasions, but generally, without any saving, only that it is to be not repugnant to the laws of the realm. It is sufficiently comprehensive to embrace every subject on which the select body could make a bye-law for the benefit and government of the borough in all matters and causes whatsoever touching or in any way concerning the said borough, or the state, right, and interest of the same.

By the construction contended for as to the bye-law there would be an anomaly, for there might be two distinct bodies in the same corporation making bye-laws on the same subject. The select body have the power of making reasonable regulations for the purpose of discussing and voting, and of imposing fines for the non-attendance of members. If the body at large had the power of making bye-laws to reduce the number of electors, they might also have the power of regulating the mode of election, and much inconvenience might arise from the clashing of these authorities. It is said, that the power of making such a bye-law as that under discussion must be vested somewhere, that the select body cannot exercise it; and that the consequence of its not being exerciseable by the select body is, that it still remains in the body at large. Admitting the bye-law in question to be necessary, I could not dissent from such an opinion, nor deny that the power of making a necessary bye-law must rest some-

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where. I agree that whatever is necessary for the maintenance and keeping alive the corporation, and continuing and securing the due succession of its members, if not expressly secured by the charter, must, by implication of law, remain as incident to the general power in the corporation at large. If necessity compels, necessity must excuse.

But it ought to be remembered, that in deciding against the validity of this bye-law, on the ground of want of authority in the body at large who made it, you will enforce one of the most important injunctions of the charter,—namely, the continuing the election of burgesses by the mayor, bailiffs, and burgesses at large,—and will act in literal accordance with the express terms of it.

I have not discovered in the researches of counsel at the bar, or in the elaborate judgments delivered in the Court below, any authority to justify and confirm the validity of a bye-law made under similar circumstances. I think, that as far as they bear on the question they tend to a contrary conclusion. In proof of this I would refer to the case of *the King v. Head*, 4 Burr. 2521. That was an information for the usurpation of the office of burgess; the Defendant justified under a bye-law made by the mayor and aldermen, with the assent of the commonalty, to avoid popular confusion. The mayor and aldermen by themselves, without the commonalty, elected a burgess; he was elected by the mayor and aldermen. By the charter of Queen Elizabeth, the power of making bye-laws was given to the mayor, aldermen and common council, and the power of elect-

ing burgesses, to the mayor, aldermen, and commonalty. In giving judgment, Lord Mansfield observed, "the body at large have no power to make bye-laws, because that power is by charter given to the common council, consisting of the mayor and aldermen, and the common council could not, by a bye-law, take away from the body at large the right of election which the charter had vested in the whole body." But this opinion of Lord Mansfield, is considered by one of the learned judges of the Court below as altogether extra-judicial and unnecessary for the decision of the case, which he has determined on other grounds,—namely, that the bye-law was not made by the body at large, but by the mayor and aldermen only, though with the assent of the commonalty, which words leaves no doubt. But with great respect for the opinion of that very able judge, I cannot consider the opinion of Lord Mansfield as extra-judicial, but as a judgment called for by the argument of counsel on the point in contest between the parties. The point to be determined was, whether a bye-law so made, was a valid bye-law? Independent of the necessity that the bye-law, to be good, should be made by the mayor and aldermen, with the consent of the commonalty, it was virtually a bye-law of the whole body. I mention this case to show that the judgment delivered by my Lord Mansfield, in which all the other judges concurred, implied a power remaining in the body at large to make bye-laws, where not expressly conveyed from them; and it is a strong authority to show, that notwithstanding the power of making bye-laws is given to a

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portion of the select body, they cannot take the power of electing burgesses from the body at large and transfer it to themselves. They did not for that purpose represent the whole of the commonalty; it was an abuse of the charter, and it was usurping the power of electing burgesses without authority: And the same principle appears to be recognised by Mr. Justice Grose, in the case of the *King v. Ashwell*; * a question arose as to a bye-law made by the mayor, bailiffs, and twelve aldermen. The power of making a bye-law was declared to be in the mayor and aldermen: Mr. Justice Grose said, even the body at large cannot make bye-laws contrary to the constitution of the charter. The counsel for the prosecution in that case contended this bye-law was good if it was made by the whole corporation; but the *King v. Spencer* † shows that they cannot make bye-laws against the provisions of the charter.

But here the whole corporation clearly could not make bye-laws, for the power of making them is given to the select body. I conceive Mr. Justice Grose was correct in saying that by the King's charter the bye-law was illegal and bad, even if made by the whole corporation. The principle was, that the express power of electing being given to the select body, and the implied power of doing so being in the body at large, they could not exercise the right without the violation of the charter. Lord Macclesfield, in the other case of *Child v. the Hudson Bay Company*, ‡ confirmed the same principle, in which he says a corporation has an implied power to make bye-laws; but where the charter gives the company a power

* 12 East, 22, † 3 Burr. 1827. ‡ 2 P. & W. 207.

to make bye-laws, they can only make them in such cases as they are enabled to do by the charter, for such power given by the charter implies a negative that they shall not make bye-laws in any other cases. These authorities, and the principle to be deduced from them, apply to the present case, in which we are called on to give our opinion on the construction of the charter, upon which I have so far made up my mind as to say, that with regard to this bye-law the charter gave no authority to the body at large to make it.

Under this impression, I shall spare you the fatigue of hearing many observations as to the next question,—namely, whether, supposing the body at large to have the power of making bye-laws, this particular one (regard being had to its objects) is valid? I have, in support of the affirmative of this proposition, very shortly to trouble you. There are certain rules and certain authorities in the books on corporation law, from which it is clear that a corporation cannot make bye-laws contrary to the spirit of the charter, and, if they do, they act without authority; and the reason of the rule is clear, for by so doing they may narrow the number of electors, which is contrary to the intention of the Crown in granting a charter, the object being to perpetuate the corporation. These points seem to have been considered and settled beyond all doubt in almost every corporation case that has come under discussion for more than a century past. The application of these principles to the particular case before you, gives rise however to considerable difficulty, when we are desired to consider

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the question as to the object and purpose of this bye-law. It must be acknowledged, that its direct object and purpose is to reduce the number of electors; and if so, and conceding that the effect of the bye-law is confined solely to the reduction of a portion of the class of electors, and that if it went no further it might be legal, yet, it is further insisted as an objection, that the tendency of this bye-law is to exclude an integral part of the corporation from their choice in elections,—namely, of burgesses, who, by the constitution and government of the borough have the right of election. In order to determine the weight of this objection, I will refer shortly to the charter and the bye-law. It appears by the facts stated in the third plea, that the charter was granted to the ancient corporation, and that the right of election was vested in an indefinite number of burgesses. In whom the power of making bye-laws vested under the ancient corporation, whether in the body at large, or the select body, does not appear, nor is it, in my view of the case, material to enquire, in the absence of all proof to the contrary, whether it could vest in the body at large? Wherever it was vested, the corporation consented to accept the charter of Charles II., and take their direction as to the government and making of bye-laws from what was expressed on the face of it. By this charter the body of the corporation at large consisted of the mayor, bailiffs, and burgesses, incorporated by the name of the mayor, bailiffs, and burgesses.

It is to be observed in this part of the argument, that for certain purposes, the mayor,

bailiffs, and aldermen, are still to be considered as distinct individual members of an entire corporation, their character of burgess not being merged or extinguished in the higher office. The election of burgesses by the charter, is in the whole body corporate, the individual members of which are to act as members of the whole,—that is, as burgesses, and not as members of any integral part. The bye-law in question narrows and restrains the exercise of that right, making the election to be by a particular part of the same class of electors instead of by the whole. The bye-law applies to so many as for the time being held the office of mayor, bailiffs and aldermen. An election might be come to by the mayor, bailiffs, and aldermen, on the part of the whole body corporate; and that this may legally be done, appears from the authority of the Case of Corporations, 4th Coke, 77, and the Colchester case, in the 3d Bulstrode, 71, and in many other cases, which have been decided in affirmance of the same principle. These cases have been referred to by men of great learning on the subject of corporations; they have been confirmed by experience, and are now sanctified by time. If it is said that they do not relate to the elections of burgesses at large, I am at a loss to conjecture on what ground the exception is made. Surely on none, unless it can be shown that less inconvenience and danger are to be apprehended from popular confusion in the election of burgesses, whose election must be of more frequent occurrence, than that of the principal officers, of the corporation, whose numbers are definite.

I see no reason why the principle of the Case of Corporations should not be as applicable to the

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election of burgesses at large, as the higher orders of the corporation in the time of Lord Holt. The same principle was recognised by Lord Holt in *The King v. Tomlyn*, Ca. temp. Hard. 316.

In the case of *The King v. Ashwell*, it is true that the right of election of aldermen was by the charter given to the mayor and burgesses, and they made a bye-law restricting the right of election to the mayor and a select number of the burgesses. On the face of this bye-law, it being confined to the election of aldermen it may be said to fall within the Case of Corporations, as it related to the election of principal officers. But in *The King v. Bird*, 13th East, the right being given to the whole body corporate of mayor, aldermen, and burgesses, the mayor and burgesses made a bye-law to restrain the number of electors to the mayor, aldermen and eighteen burgesses there mentioned. The bye-law was decided by Lord Ellenborough and the whole Court to be a valid bye-law. But it must be observed, that these were persons who had been before elected by the burgesses to fill their office in the corporation. The body, therefore, appears to have consisted of a very slight description of burgesses, who were elected by persons within the corporation. I certainly have not found any decision whatever, which impugns that doctrine. There are, indeed, the doubts of Lord Kenyon incidentally advanced on the doctrine in the Case of Corporations; but he never went so far as to pronounce such a bye-law invalid, and they were doubts rather in the nature of a protestation, and no more: he appears too to have reserved the right of retaining his judgment

unfettered, until the actual question should arise. For he says, I wish to avoid saying anything respecting the propriety of a bye-law to restrain the number of electors; and in *The King v. Holland*, (2 East, 70,) he says, “Not that I am prepared to say that such a bye-law, if it had existed, would have been sufficient to transfer the power from the body at large to a select part of it.”

In *Newling v. Francis*, 3. T. R. 189, where one question was as to the right of electing an officer,—that is the mayor,—where the election was not regulated by the charter of the corporation, a bye-law was made to regulate it. Lord Kenyon says, “The special verdict states that there is no prescriptive mode of election; it is therefore necessary to resort to the bye-law which has regulated the election. For if the bye-law does not exclude those persons, who were intended by the King’s charter to concur in the election, or does not narrow the number of persons eligible, it may be good. A bye-law cannot indeed exclude integral parts, as was decided in the Maidstone case; but generally speaking, within these bounds the mode of election may be regulated by provident bye-laws. Now in the Corporation of Cambridge, there was no other standard previous to the charter of Charles II.; and if, prior to that time, the bye-laws of the corporation were competent to regulate the mode of election, they continue so at this time, unless some alteration in this respect was made by that charter. If that charter has regulated the mode of election, and is the subsisting charter now, the corporation must conform to it.” If this

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is the only way, in which the opinion of Lord Kenyon could be called doubtful, with respect to the propriety of a bye-law to restrain the number of electors, I should say, it was pregnant with inconclusiveness. I cannot, therefore, allow that any of the judgments delivered by Lord Kenyon, during the whole period he presided in the Court of King's Bench, either bear directly or remotely on the questions under consideration. Nor can it be fairly said, that in any respect has he ever expressed a decided opinion, that, supposing the body at large had the undisputed power of making bye-laws, it might not legally have been done. It is, however, true, that the doubts expressed by Lord Kenyon were considered by Lord Ellenborough as resting on no authority, and there certainly seems, in direct contradiction to those doubts, a number of decisions in affirmance of the Case of Corporations continuing down to the present period.

Upon the whole, therefore, I am of opinion, that if the charter had not conferred on the select body the express power of making bye-laws, but had given it to the body at large, or had made no provision on the subject, it would have belonged to the mayor, bailiffs, and burgesses in their corporate character; and under these circumstances, the bye-law stated on the record, regard being had to the objects of it, would have been a legal and valid bye-law; but the power having been expressly given by the charter to the select body, in most general and extensive terms to make bye-laws, the presumption of any such implied power existing in the body at large is effectually taken away, and therefore this bye-law is invalid.

Mr. Justice Gaselee.—It is clearly settled, that a power to make bye-laws is incident to every corporation. If it were necessary to cite authorities upon this part of the case, I should merely refer to the case of Sutton's Hospital, 10th Reports, in which it is laid down, that where a corporation is duly created, all the other incidents follow; and the Maidstone cases do not contain any thing contrary to that doctrine. It has been said by the Court,* that the power of making bye-laws is incident to every corporation, either belonging to the body at large or the select body. In the case of *Rex v. Routledge*, Dougl. 535, where an objection was taken that the return did not set out a power in the corporation at large, Lord Mansfield said, "they have
 " set out the charter, and there is no special power
 " thereby given, either to the whole body or to a
 " select part; but as the charter makes them a cor-
 " poration, the law implies that it should be in the
 " whole body." Mr. Justice Buller, in summing up to the jury, had left the case with them in the following terms:—"there are two distinct ques-
 " tions in the case, perfectly independent of one
 " another, and I will take your opinion sepa-
 " rately on the first, because if that opinion should
 " be one way, it would become unnecessary for
 " you to consider the other question. He then
 " said, that if the practice was at all reconcileable
 " to the charter, that must be taken as the autho-
 " rity and rule for the appointment of the consta-
 " bles, and that it seemed to him that the nomina-
 " tion by the aldermen might be consistent with an
 " election by the mayor, &c., and commonalty. It
 " was not denied, that part of the charter had been

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* In the Comp. of *Feltmongers v. Davis*, 1 B. & P. 100.

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“ accepted; the present corporate name was that
 “ given by the charter, and he was inclined to
 “ think, a charter must be accepted in *toto*, if at
 “ all.” I would not have troubled you with
 these authorities, had I not heard it was ob-
 jected elsewhere that the plea in this case was
 bad, in not alleging, that before granting the
 charter in question the body at large or the select
 body had the right. Whether that objection will
 be urged to-day or not, it is impossible for me to
 say ? Should it be so, it seems to me, that the
 authorities to which I have referred will be an
 answer to that objection, and that it may be
 taken for granted, that the power of making bye-
 laws is in the body at large, unless the contrary
 be shown. It is said in the present case, that in-
 asmuch as the charter in question gives a power
 to the select part of the corporation to make bye-
 laws, it is wholly taken away from the body at
 large, and that they are incompetent to make them.
 But it appears to me, that this does not necessa-
 rily follow. I am of opinion, that the general
 power remains as to those things to which the
 special power does not extend. In the case of
The King v. Head, 4th Burr. 2521, Lord Mans-
 field said, “ the body at large had no power to
 “ make bye-laws, because that power is by the
 “ charter given to the common council, consisting
 “ of the mayor and aldermen, and the common
 “ council could not by a bye-law take away from
 “ the body at large the right of election, which the
 “ charter had vested in the whole body.” With
 great respect to that authority, the first part of
 that observation appears to me to be unnecessary
 to the determination of the case. It does not ap-
 pear to be the statement of his Lordship’s judg-

ment; for on Mr. Thurlow stating his argument, Lord Mansfield stops him and makes that observation, which is composed of two parts; first addressing itself to the point he was arguing, namely, whether the body at large had authority to make the bye-law? The latter part of it was that on which the case was decided, namely, that the bye-law was bad, not being made by the body at large, but only by the mayor and aldermen, with the assent of the commonalty: the latter words made no difference, for the commonalty not being assembled to assent, the bye-laws were to be made by the mayor and aldermen only; and by law it is wholly insupportable, inasmuch as it struck out an integral body of the electors.

So in *Newling v. Francis*, 3 T. R. 196, an objection was taken to a bye-law independent of the question, whether it was made by the body at large? And the bye-law was held void, inasmuch as it gave to a party the casting vote, a privilege which the corporation, either in its select or general capacity, had no authority to give either by the charter or at common law. In the case of *Hicks v. Launceston*, in 1st Rolle's Ab. 513, it is said by the Court, "if the King create a corporation of a mayor and eight aldermen, with a clause, that upon the death or amotion of any alderman, it should be lawful for the mayor and the rest of the aldermen, within eight days next after such death or amotion to elect another alderman in his place, although there be no election within the eight days, yet they may elect an alderman at any time afterwards, for they have a power to elect another as incident to the corporation created; for anciently corpora-

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"tions had no such clause giving them power to elect, and this affirmative power does not toll the implied power incident to the corporation." So I say here, the affirmative power given to the select body does not take away the power incident to the body at large, in a case where the power is not given to the select body.

The first authority I think it necessary to trouble you with, to show that this bye-law is good in itself is the case of *The Corporation of Colchester*, 3d Bulstrode, 71, which was decided in the 13th of James the First, which has been already so often stated that I shall not repeat it. So in *The King v. Spencer*, in 3d Burr. 1827, by the charter of Maidstone the power of electing the common councilmen was in the mayor, jurats, and common council. The mayor, jurats, and common council made a bye-law, restricting the power given by the charter to the mayor, jurats, and commonalty to elect a common councilman; the commonalty had a power to vote in the election of a common councilman. But the bye-law said, "be it enacted, that the election of common councilmen in future be made by the mayor, jurats, and common council, and such of the common freemen as have resided and served certain offices of the town." The Court held this bye-law was bad, for this, among other reasons, that the select body was authorised to make bye-laws, and they were not to take the power of elections from others and give it to themselves. There was a similar determination in *The King v. Cutbush*, 4th Burr. 2204. There another bye-law was made by the same body, after *The King v. Spencer*. In that

case the Court said, "it is made by a part of the
 "corporation to deprive the rest of their right to
 "elect without their consent. The charter gives
 "this right to the whole body of the commonalty,
 "the bye-law confines it to the narrow compass of
 "the sixty seniors only: this expressly contradicts
 "the charter." The same point was also decided
 in *The King v. Head*.

The only remaining point of inquiry is, whether the bye-law is legal and valid, regard being had to the object and provision of the said bye-law? Before entering into this inquiry, perhaps it would be desirable to call your attention to the terms and objects of the bye-law, which appears to have been made by the body at large. It is made for the better rule and government of the said borough, touching and concerning the election of the burgesses of the said borough, and their interests. Though it is said to be made for the better rule and government of the borough, its main object is touching and concerning the election of the burgesses of the said borough for the time then to come, in order to avoid popular confusion and disorder in such elections, by which said ordinance or bye-law it was ordained and established, that from thenceforth the mayor and common council of the borough, or the major part of them, duly assembled together for that purpose within the said borough, should and might, from time to time, and at all times thereafter, by themselves and without the concurrence or assistance of the rest of the burgesses of the said borough, elect and choose such person or persons to be a burgess or burgesses of the same borough as to them,

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the said mayor and common council of the said borough for the time being, or the major part of them, so assembled as aforesaid, shall seem meet. The apparent object of the bye-law is the avoiding popular confusion at elections. Is this a legitimate object? On this point, in addition to the authorities before cited in the case of the Corporation of Colchester, reported by Bulstrode, I refer you to the well known Case of Corporations, in 4th Coke, 77 b, which having been already stated, I shall not trouble you with repeating it, but shall only just advert to the observation which Lord Coke makes on the resolution,—“And according to “this resolution, the ancient and continual “usages have been acknowledged in other ancient cities and corporations, and God forbid “that they should now be innovated or altered, “for many and great inconveniences will thereupon arise, all which the law has wisely prevented, as appears by this resolution.”

The next case with which I shall trouble you is, *The King v. Ashwell*, 12th East, 22. That case is so similar to the present, that I feel myself called upon to state the particulars of it. It was an information against the Defendant, calling on him to show by what authority he used and exercised the office of one of the aldermen of the borough of Nottingham. To this it was pleaded, that Nottingham was immemorially an ancient town, and that the burgesses at the time of granting the charter were immemorially a body corporate, and that during all that time there had been and now was an indefinite number of burgesses; that King Henry the Sixth by his char-

ter confirmed to the burgesses to be a corporation by the name of "The mayor and burgesses of "the town of Nottingham," and that the then burgesses of the town, and their successors, should always have, in the place of two bailiffs of the town, two sheriffs, to be chosen from themselves in the manner therein mentioned. He farther granted to the said burgesses and their successors, and their heirs, from time to time, to elect from themselves seven aldermen for life, of whom one was to be mayor; and that upon the death, departure, or amotion of any alderman, the mayor and burgesses for the time being should elect one other burgess from themselves into the office of alderman, and that the aldermen should be justices of the peace within the same town. It then stated, that after the acceptance of that charter, namely, on the first of May, 1577, the then mayor and burgesses duly made a certain reasonable bye-law, not then extant in writing, for the avoiding popular confusion and tumult in the election of aldermen, whereby it was ordained very nearly in the terms of that bye-law which is the subject of the present case. The object was to elect by a part only, without the rest of the burgesses. A verdict having been found for the Defendant on those issues, before Mr. Justice Le Blanc, at Leicester, a rule was moved for and obtained, calling on the Defendant to show cause why judgment of ouster should not be entered against him, notwithstanding the verdict, founded on an objection, that the bye-law stated in the Defendant's plea was an unreasonable and therefore an invalid bye-law, as taking the right of election of aldermen from

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the burgesses at large and confining it to a select body, which did not even require the attendance of the majority of the integral parts of the corporation to constitute the elective assembly. But this objection was over-ruled by the whole Court. What my Lord Ellenborough says is very important; he says, "We are called upon to pronounce this bye-law to be void as unreasonable, because it restrains the right of electing aldermen to a select body, which before was possessed and exercised by the body at large, and therefore it is argued, that it affords a greater chance than before of the entire non-attendance of the electors, or at least that there needs only the attendance of the mayor and one other, or perhaps two other burgesses, in order to constitute a good election under it, and that the chance of so small an attendance is greater under the restricted power of election given by the bye-law, than under the extended right conferred by the charter. But in order to avoid a bye-law, upon the ground of its being unreasonable, because of some inconvenience that may result from it, it should appear to be a probable inconvenience, for one can hardly predicate of any law that some possible inconvenience may not result from it; but is it likely to happen? Now this bye-law has existed for above two hundred and thirty years, and during all this time, if any inconvenience had resulted from it, it was competent to the corporation, by the same authority which enacted, to have repealed it. But the long continuance of a bye-law, though it would not legalize it, if it were not in itself legal, is fair evidence to show that

“ there is no intrinsic inconvenience in it; at least
 “ the acquiescence of the corporation in it for above
 “ two centuries is a fair answer to any theoretical
 “ argument of inconvenience, especially when it is
 “ considered that they might have relieved them-
 “ selves from the inconvenience, if it existed at all,
 “ at any hour of that long period, by repealing the
 “ bye-law. Then consider what the bye-law is; it
 “ is a delegation of the right of election by the
 “ indefinite body of the corporation at large to a
 “ select part of themselves, consisting of such
 “ of the burgesses as had served or were serving
 “ certain offices, and were called livery or clothing
 “ burgesses. Such a bye-law has the convenience
 “ according to the opinion of the Judges in the
 “ Case of Corporations of preventing popular tu-
 “ mults, and therefore it was approved of by them.
 “ It is not open to the objection which prevailed
 “ in *The King v. Spencer*.” He then draws the dis-
 “ tinction between this case and that of *The King*
 “ v. *Spencer*; for that there the bye-law imposed on
 “ the corporate character of the electors a qualifica-
 “ tion which was quite foreign to it, and then he adds,
 “ I do not say that any thing which may be done
 “ by charter may be done by a bye-law; but with
 “ respect to elective functions to be performed by
 “ the body at large, they may in this manner dele-
 “ gate them to a select part of themselves; and I
 “ cannot say, that it is an unreasonable bye-law
 “ because an inconvenience may, by bare possi-
 “ bility, result from it.” Mr. Justice Grose says
 “ It has been settled since the Case of Corpora-
 “ tions, that a bye-law made for that purpose is
 “ valid; the reason assigned for which is in order
 “ to prevent popular confusion and tumults in

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“elections, and an excellent reason it is.” Mr. Justice Le Blanc says, “It is not necessary to maintain that the same provision must be reasonable and valid in a bye-law which would be good by charter or prescription; but it is sufficient to say, that it is no more unreasonable to provide, that a particular number of the whole body, should, on being duly assembled for the purpose, make such election, than that the whole number should elect.” And Mr. Justice Bayley observes, “the Crown by its charter may impose what terms it pleases; and if the parties accept the charter no objection can be made on the ground that these terms are unreasonable; but where the question is upon a bye-law, it is open to object to whatever is unreasonable in it. But I see nothing unreasonable in this bye-law; it does not give the right of election to those who had no right before; it does not dispense with the attendance of any person whom the charter expressly requires to attend, but merely to avoid popular confusion, the corporation made a bye-law, that the election of aldermen should be made by a certain description of their own body. And this bye-law only operates upon the body at large, so long as they think fit to continue it; it is liable to be reconsidered by them at all times; it only binds their successors so long as the successors choose to be bound by it, for the same body that made the bye-law may repeal it.”

In comparing the charter of Nottingham with that of the present case, it appears that it raised pretty much the same point as that which is now under consideration. In the two Maidstone cases,

Lord Kenyon expressed a doubt,—but that has been already so much observed upon, that I will not trouble you upon it. The Charter in question is not like that of Nottingham: here the description is “the mayor, bailiffs, and burgesses;” there it is “the mayor and an indefinite number of burgesses.” The charter directs, that one of their body is to be sworn in as mayor before his predecessor, the late mayor; and it directs that there should be thenceforth one mayor, two bailiffs, and twelve discreet men, continually residing in the borough, who shall be called aldermen. The aldermen, as well as the bailiffs, are to be elected out of the burgesses, and being elected bailiff or alderman, they still are burgesses. No integral part of the body is excluded, no new body is introduced. The exercise of the power of election is merely narrowed to a part of the burgesses themselves, namely, the mayor, bailiffs, and aldermen, who have become so from the general body of burgesses. It has been said in all or most of those cases which are authorities, that this bye-law relates to the election of such officers or persons who from necessity fill the same office; and that it is a different thing whether it is a bye-law made by the same body whose rights are affected, or a bye-law saying, that the members of a corporation, who formerly exercised the right of voting, should be deprived of it. It seems to me, there is no sufficient ground for drawing any conclusion from that. In the *King v. Bird*, 13th East, 367, the distinction was taken. It was, however, further observed, that having debarred the whole body of their right to vote in the election of burgesses, it could not af-

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fect the supply of common burgesses, because the eldest son of every burgess born in Nottingham, and the younger son of every person born in Nottingham serving an apprenticeship to any trade, and all other persons serving seven years at Nottingham to any burgess of Nottingham, was entitled on attaining twenty-one, to his station of burgess; so that that fully provided for the number of burgesses being kept up. It is objected, that the bye-law in this case has the direct tendency to keep the number of common burgesses below the number of the select body, who have an interest that the number of burgesses should be smaller than that of the select body. To this I answer, that the purpose of the bye-law is the election of burgesses, and not the diminution of their number. The words of the bye-law have been mentioned, I will not therefore trouble you with them. But I would also say, that it by no means follows, that if that which is suggested were probable, namely, that the tendency of it was to bring the number of burgesses below that of the select body, that the bye-law would be bad. There is no duty to be performed by the common burgesses; it can require therefore no particular number of them. All that is necessary to be done is to be done by the select body, whose number is limited; and whenever there is a vacancy in that body, they may elect a sufficient number of the common burgesses, from whom they are to be taken; and with respect to the select body, they may meet and elect a sufficient number, so that by this bye-law the same effect may be produced by the mayor (who is always one of the select body) and the common councilmen taking on

themselves the election of common burgesses, as if it were in the body at large.

Upon these grounds, therefore, I humbly answer the question proposed, that the bye-law alleged in the third plea is a legal and valid bye-law, having regard to the purpose and object of the provision.

Mr. Justice Littledale.—On the first part of the question, as to the power of this corporation to make bye-laws, I shall consider, first, Whether this corporation has the power to make bye-laws independent of a special provision in the charter? In the next place I shall consider the general law on the subject, having regard to the provisions of this particular charter. Now there is no doubt, generally speaking, that a corporation has the power of making bye-laws. This doctrine is fully and clearly laid down in the *Sutton's Hospital* case, in 10th Coke, 31, and in 1st Rolle's Abridgment, 513, title Corporation, G., pl. 5; *Norris v. Staps*, Hob. 210; and *The City of London v. Vanacker*, 5th Mod. 439; and 1st Lord Raym. 496, and several other reports; and it is also laid down in more modern cases; but it is not necessary for me to read what is said in these cases with regard to this question.

This being the general law as to corporations, it is to be seen how far that may be altered, if there be a charter which gives a power to the select body to make bye-laws. If there be a general power given to the select body to make bye-laws in all cases whatever, no doubt the general right of making bye-laws incident to the body at large no longer remains the same. If a power be given to the select body to make bye-laws, extending only to some particular cases, then the question is,

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whether the power which the body at large has, is taken away by the select body only in these particular cases? and in my opinion the power is only taken away in those cases, to which the rights of the select body extend. The law says, the power is incident to the corporation that they may be well governed. This power of well-governing must be taken to extend to all things which fall within the province of the acting body. It is quite clear, and follows as a necessary consequence, that where the power is vested in the select body, the body at large cannot make bye-laws, ordinances and regulations which are necessary for the good order and government of the corporation. In *Child v. the Hudson's Bay Company*, 2 P. Williams, 209, Lord Macclesfield says, "A corporation has an implied power to make bye-laws; but where the charter gives the company the power to make bye-laws they can only make them in such cases as they are enabled to do by the charter; for such power given by the charter implies a negative that they shall not make bye-laws in any other cases." With regard to the question before him, he observed, that the corporation had a power of making bye-laws for the purpose,—and only for the purpose,—of better governing the company and for the managing and directing their trade to Hudson's Bay. What is said by Lord Macclesfield applies only to cases where the body at large have an express power given to them.

This is a case in which the select body have an express power given to them; and the question is, whether a power may be given to the select body to take away the power of the whole body, so far

as relates to the election of burgesses, with which they have heretofore had nothing to do. In *The King v. Head*, 4th Burr, 2521, Lord Mansfield says, "The body at large had no power to make "bye-laws, because that power is by the charter "given to the common council, consisting of the "mayor and aldermen; and the common council "could not, by a bye-law, take away from the "body at large the right of election which the "charter had vested in the whole body." The first part of what my Lord Mansfield said was in no way necessary for the decision of the case,—the power of the body at large was not in question,—the bye-law was not made by the body at large, but by the common council. The assent of the commonalty did not give them authority to make the bye-law, and the bye-law was bad in every way. No doubt if a charter give to the common council the power to make bye-laws, the body at large cannot do it. That may be all that Lord Mansfield meant to state. The point I am endeavouring to make out is, whether the select body, which is only a part of the corporation, can have authority over a subject to which the original power of the select body does not extend? Except the two cases of *Child v. The Hudson's Bay Company*, and *The King v. Head*, there is nothing established to the contrary of my proposition. Supposing my opinion to be well founded, it will be as well to consider how far that proposition is applicable to the charter of this corporation.

This corporation appears, by the third plea, to be an ancient borough, and to have had, from time immemorial, an indefinite number of burgesses; and in the reign of Charles the Second a charter was

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granted by that King, giving to this corporation the name of "mayor, bailiff, and burgesses of the borough of Chepping Wycombe, in the county of Bucks," and by that charter it was provided, that there should be one mayor, two bailiffs, and twelve aldermen, who are the only officers appointed by the charter; and then the charter directs that "the mayor, bailiffs, and burgesses of the borough, and their successors, or the major part of them, from time to time, for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the borough, as to them should seem most expedient to be burgesses of the said borough." Then it goes on to state, that there should be a common council, and "the King did thereby grant and confirm to the mayor, bailiffs, and burgesses, that the aldermen and bailiffs should be, and be called, the common council of the borough, and that the mayor, aldermen, and bailiffs of the borough, and their successors, for the time being, or the major part of them, (of whom the mayor for the time being the King willed to be one,) might and should have full power and authority to frame, constitute, and ordain and make, from time to time, such reasonable laws, statutes, and ordinances whatsoever, as to them should seem good, wholesome, useful, honest, and necessary, according to their sound discretion, for the good rule and government of the burgesses, artificers, &c., inhabitants of the said borough aforesaid, for the time being, and for declaring in what manner and order the aforesaid mayor, aldermen, bailiffs, and burgesses, and the artificers, inhabitants and resi-

“dents of the borough aforesaid, should behave,
 “conduct, and carry themselves in their offices,
 “mysteries, and business within the said borough
 “and the limits thereof, for the time being; and
 “otherwise for the further good and public ad-
 “vantage and rule of the same borough, and the
 “victualling of the same, and also for the better
 “preservation, government, disposition, letting,
 “demising of lands, tenements, possessions, re-
 “venues, and hereditaments to the aforesaid
 “mayor, bailiffs, and burgesses, and their succes-
 “sors by the said letters-patent, or otherwise,
 “given, granted, assigned, or confirmed, or there-
 “after to be given, granted, or assigned, and other
 “matters and causes whatsoever, touching or in
 “any ways concerning the said borough, or the
 “state, right, and interest of the same borough.”

Now upon the best consideration I can give to
 the case, these words do not appear to me to take
 from the body at large the power of making bye-
 laws for regulating the election of burgesses.
 Some of the things over which a power is given
 to the common council relate to the government
 of the borough, and I think the general words can
 only apply to the government of the borough, as
 a formed borough, with the various members of
 the corporation in its then state of actual existence,
 and that they do not apply to the case of new
 persons, who were thereafter to become members
 of the borough, with whom this common council
 have nothing to do. The election relates to a dif-
 ferent body,—and we cannot suppose that it was
 ever meant that the common council should in any
 respect regulate the election of burgesses, unless
 it was expressed by the words of the charter.

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In *The King v. Head*, 4th Burr. 2515, Lord Mansfield says, "the common council could not by a bye-law take away from the body at large the right of election, which the charter had vested in the whole body;" and in *The King v. Spencer*, 3d Burr. 1827, Lord Mansfield says, "It appears to me, that where the power of making such bye-laws is by charter given to a select body, they do not represent the whole community, and therefore cannot assume to themselves what belongs to the body at large; but where the power of making bye-laws is in the body at large, they may delegate the right to a select body, who become the representative of the whole community." Then if the select body have no power to make bye-laws regulating the election of burgesses in the present case, the regulation cannot be made at all, unless it be by the body at large; and this consequence will follow, that though the corporate body has the power to make bye-laws, yet no regulation can be made at all for the election of burgesses. Independent of other inconvenience, this construction leaves the power to make bye-laws, in particular cases, unexercisable.

But another ground on which I think the body at large have the power of making bye-laws for this purpose is this, that by the charter express power is given to the corporation at large to elect those burgesses, without whom the King's grant cannot be made useful. Whatever is necessary to effect the objects of the charter passes by the grant; that rule is so clearly established, and the authorities are so numerous, that it is quite unnecessary to state any of them. I consider that

this express power to elect is incident to the corporation, as well as every thing that is essentially necessary to carry the object of the Crown into effect.

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Then it may be said, you cannot consider any thing as incident to the power of election, except what is essential and necessary to carry it into effect, and that this bye-law is not essential and necessary. But I think the terms of the charter are not to be so limited; I think that the power to elect burgesses includes a power to make all reasonable regulations, which the common law allows for the constant exercise of that right. In the case of *The King v. Bird*, it was held, that where there was a power to make new burgesses; a power to make new burgesses includes, as incidental to it, the power of adding to the number of electors. That is the ground on which it is expressly decided by the authorities, and I think the incidents to the grant are not confined to those cases where it is actually necessary, but that it includes all that the common law can give. One argument used as to the power remaining in the body at large is, that by this charter so extensive a power is given to the common council, that it cannot be presumed the Crown meant the body at large should have that power. But I, for one, cannot feel the force of that argument, because if it be once conceded that the power of the common council does not extend to the whole object of making bye-laws, any other authority they have is quite immaterial to the question.

But, I now come to the second part of the question, as to the bye-law. And here a general observation has been made, namely, that the

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power to elect is not given to the mayor, bailiffs, and burgesses generally, but to the mayor, bailiffs, and burgesses, or the major part of them; the charter expressly says, "or the major part of them." I think there is not much weight in that, for it has so been laid down in a variety of cases, where the charter spoke of the majority of the corporation. I think this clause of the charter gives the power to the corporate body. You may put the common case where aldermen may be substituted for the burgesses at large, in order to avoid popular confusion; *Rex v. Bird*, 12th East, 385, and the doctrine is fully illustrated in 4th Coke, 77 b. I need not read the general proposition, which establishes, that for avoiding popular confusion, the mayor, bailiffs, and other officers are to be elected by a select number of the principal part of the commonalty and burgesses; it will be found fully laid down in Bulstr. 71, and Jenk. 273: these are not the only cases on the subject: the same rule is still recognised in several modern authorities. The particular circumstances of several of them have been so fully stated by some of my learned brothers, that it is unnecessary to recur to them.

Cases have occurred, where questions have arisen as to the application of the rule, as in *The King v. Spencer*, in 3 Burr. 1827, where the power of electing the common councilmen was granted to the mayor, jurats and commonalty, or the major part of them: And they made a bye-law to restrain the number of electors to the mayor, jurats, common council, and such common freemen as resided in, and served for a year as churchwarden and overseers, for the town and parish of

Maidstone, or the major part of them. But it was held, that such a bye-law, narrowing the number of electors, could not be supported; for it was not made by the competent body, for it was to the exclusion of the commonalty, and moreover neither could they limit the right of election to persons not named in the charter, namely, such of the common freemen as had resided in, and had served for a year the office of churchwarden and overseers of the poor. In *The King v. Cutbush*, 4th Burrows, the bye-law was made by the mayor, jurats, and common council, to confer the right of election on the mayor, jurats, and common council, and sixty senior common freemen. There the bye-law was held bad, because the right of election was in the mayor, jurats, and commonalty, to whom the power of election by the charter was given. Then in *The King v. Head and others the freemen of Helston*, in 4th Burrows, which I before referred to, the burgesses were incorporated by the name of the mayor and commonalty, and by the charter four aldermen were created, who, with the mayor, were to be the common council, and they had a power to make bye-laws. The right of election was in the mayor and commonalty, with the aldermen; and the common council with the assent of the commonalty, made a bye-law that the mayor and aldermen, exclusive of the commonalty, should elect the burgesses, and it was held bad, because it excluded the commonalty. It will be observed also, that there an integral part of the electors was excluded, namely, the commonalty, for the power of election was in the mayor aldermen, and commonalty, and therefore,

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they could not exclude the commonalty, who were by these means not represented. It may be observed, also, that the bye-law was irregular, first, because it was not made by the mayor and aldermen only, who had the power to make bye-laws; they called on the commonalty to assist, not as forming part of the meeting, therefore, under the charter it was bad. Secondly, it was bad under the general powers in a corporation, because the aldermen, as a body, were not the corporation, as the mayor and commonalty were the corporation, and the commonalty were called only to assist, and did not form an integral part of the meeting. Thirdly, it was bad, because, if made by the mayor and aldermen only, they, as a select body, had no right to make bye-laws as to elections, where the right was vested in the mayor and commonalty, together with the aldermen.

Then in *The King v. Ashwell*, which is in 12th East, 22, the right of electing aldermen was given by the charter to the mayor and burgesses, who made a bye-law, restricting the electors to the mayor and certain of the burgesses, namely, the recorder, aldermen, and coroners, common councilmen, and such of the burgesses as had served the office of chamberlain, and such bye-law was held good. In *The King v. Bird*, 13th East, 367, the right of election of burgesses was by the charter in the mayor and burgesses, being the corporate body; the mayor and burgesses made a bye-law to restrain the number of electors, to the mayor, aldermen, and eighteen burgesses there mentioned, and the defendant was elected under the bye-law. No doubt was entertained

as to the general right of the corporate body to make a regulation to limit the number of electors, and the defendant was held well elected. This is the last case on the subject, and in all these cases the general power of the corporate body is admitted. Then questions may arise, Whether, admitting the general right of the corporate body, this restriction falls within the principles of law? And one objection may be, that the aldermen do not fairly represent the burgesses, because there is no doubt, that in the body created by the bye-law or regulation the burgesses must be represented. I am very free to admit, that there is as little representation of the burgesses as one can well imagine, and much less than has occurred in any of the cases; but still they do in a small degree represent the burgesses. The aldermen, by being elected, do not cease to be burgesses, they are still burgesses, though with more authority; they are not an integral part of the corporation. If there be a meeting of the body corporate, which consists of the mayor, bailiffs, and burgesses, it is not necessary that any of the aldermen should be present, and if they are present, they do not vote as aldermen, but as burgesses. The aldermen are elected by the mayor and the residue of the aldermen. So that, though remotely, the burgesses have something to say to the elections, and I think the aldermen may be considered as representing the burgesses, and they are only a different body from the burgesses at large, when in their quality of aldermen, they are to discharge the various duties assigned to them. It must be observed also, that this mode of election is that, which was

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adopted by custom before the charter in question, and therefore, one may well presume that it was a reasonable mode of election, and not attended with any prejudice or inconvenience to the general interests of the corporation; and though that cannot be taken into consideration in considering the effect of the second plea, because the facts stated in one plea cannot be brought to bear upon the facts in another plea, so as to affect the construction of that plea, yet one may at all events put a supposition that such a mode of election might exist before the charter. It may be said, that the rule laid down in the Case of Corporations does not extend to burgesses, but only to the higher corporate officers, and that the language of the resolution is only applied to them. But the same reason applies to burgesses that does to the higher officers of the corporation, and there is even a still stronger reason "for avoiding popular tumult and confusion," because the election of burgesses is of more frequent occurrence than that of the higher officers. The case of *The King v. Head* was that of the election of a burgess, and no distinction was made between a burgess and any superior officer of the corporation. *The King v. Bird* was also the case of a burgess, and no distinction was taken by the Court between him and other officers. The point was noticed in the argument, but not in the judgment. It has been held, indeed, as appears by the 4th Inst. 48, that if the corporate body at large have a right to elect members of parliament they cannot delegate that power to a select body, but that is, because it is considered as for the benefit of the public that they should all have votes, and it is not to be com-

pared to the case of the election of mayors and other officers of corporations. If the bye-law be found inconvenient, the corporate body may repeal it by the same authority by which they made it, and therefore if any mischief be likely to arise, they may correct it themselves.

I am therefore of opinion that this is a good and valid bye-law.

Mr. Baron Garrow.—In a case where I can only explain my reason for thinking this a good bye-law, by going over details in a less lucid order than has been used in the arguments addressed to you by my two very learned brethren who have preceded me, I shall simply state the conclusion to which I have arrived, without troubling you with the cases they have cited, or offering any observations upon them. After having exercised the best judgment that belongs to us, in order to prepare ourselves in a clear and proper manner to answer the questions you have been pleased to propose, I am one of those who concur in the opinion which has been pronounced by the two learned judges who have just addressed you. I shall only state that I did entertain some doubt on the question, whether the corporation had the power of delegating this right to the select body? but I have at length arrived at a step where I have satisfied my own mind that they have that power: and after the conflicting opinions of the Court below, however difficult it might appear to decide, whether this was or was not a legal bye-law? if the question is put to me whether it is or is not, I am prepared to say that it is not only a legal, but a convenient and meritorious and useful bye-law. I

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have thus briefly stated my opinion, because I thought the convenience of the House would be best consulted by such a course.

Mr. Justice Park.—The question that has been proposed to the judges is extremely concise, and brings the matter to a single point; and notwithstanding the very great length of the argument in the Court below, and the elaborate judgment of two of my learned brothers, who have preceded me on the same side, I shall be extremely brief, agreeing entirely as I do with my three learned brothers, Garrow, Littledale, and Gaselee, in the opinion they have just pronounced.

The question is, whether the alleged bye-law stated in the third plea is a legal and valid bye-law, having regard as well to the power of making bye-laws, in that plea mentioned, as to the object and provisions of the bye-law itself? The third plea has been so often under your observation that I should think it waste of time to state it again.

I take it to be quite clear, ever since the case of Sutton's Hospital, that the power of making bye-laws is incident to every corporation, where such incidental power is not restrained by the words of the charter. The generality of that incidental power is restrained by giving a power to the select body to make bye-laws in certain cases. I admit, that if the power be given to a select body to make bye-laws in all cases, that the general inherent power is entirely taken away from the body at large. But, on the other hand, it seems to me no less clear that if a special power be only given in certain cases, the general authority in all other cases remains in the body at large.

Let us see what is the power to make bye-laws

that is given to the select body: it is, that the mayor, aldermen, and bailiffs of the borough, and their successors, who are the select body of this corporation for the time being, or the major part of them, (of whom the mayor for the time being the said late king willed to be one,) "might and " should have full power and authority to frame, " constitute, ordain, &c. &c. &c. and other mat- " ters and causes whatsoever touching or in any- " wise concerning the said borough, or the state, " right, and interest of the same borough." My brother, Mr. Justice James Parke, seems to lay great stress upon the words "and other matters " and causes whatsoever touching or in anywise " concerning the said borough, or the state, right, " and interest of the same borough." These words are certainly very large. This is the power given by the charter to the select body to make bye-laws, and if the bye-law in question fall within any of the powers herein contained, there is an end of the question. But it was admitted in the argument in the Court below, and I own until this day I never heard it disputed, that the select body, to whom the power I have just recited is granted, would not have authority to make the bye-law in question, inasmuch as it would enable them as a select body to make a law to diminish the power of the body at large. This has been questioned in argument to day, but that argument seems to me to have been extremely well answered by my learned brothers Littledale and Gaselee.

Then if it be true that every corporation at large has an incidental power to make bye-laws, except so far as it is restrained by the express words of the charter, and if it be admitted that this bye-law

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does not fall within the words of the special authority, it seems to be a necessary consequence that all that, which the king has not expressly taken away, remains in the body at large.

But it is said that a different doctrine relative to this point, is laid down in *The King v. Head*, 4th Burr. 2515. But with all due respect to those who urge that point, it seems to me that no two cases can be more dissimilar. In that case the body at large had no power of making bye-laws, but the mayor and aldermen, and the mayor and aldermen only; they were the select body. The bye-law was made by the mayor and aldermen with the assent of the commonalty, which ought not to have been, because the commonalty were not authorized to be parties to such a law. By the charter the right of election of burgesses was expressly given to the mayor, aldermen, and commonalty of the borough, whereas the bye-law struck out an integral part of the corporation,—namely, the commonalty,—and it could therefore be of no avail as they had no right conferred on them for making such a bye-law.

Therefore I think, that the case before you cannot be governed by the case of *The King v. Head*. I think the corporation at large had the power to make this species of bye-law, it not being a matter or cause intended by the King in his charter to be included in the power given by him to the select body.

But it is said, that even if the corporation had the power of making such a bye-law, this is void, because it transfers the right of election of burgesses to the mayor and common council without the assistance of the rest of the burgesses of the

borough, and it is therefore unreasonable, and varies the constitution of the borough, striking off an integral part of the corporation. On this point there is, I understand, less difference of opinion among my brethren than on the former question.

What then is the bye-law? It is set out "that the mayor, bailiffs, and burgesses of the borough," (that is the body at large by their corporate name,) "or the major part of them, being in due manner met and assembled for that purpose within the said borough, did, then and there, duly make a certain ordinance or bye-law for the better rule and government of the said borough, touching and concerning the election of the burgesses of the said borough for the time to come, in order to avoid popular confusion and disorder on such elections, by which it was ordained and established in manner following, namely,—that from thenceforth the mayor and common council for the borough, or the major part of them duly assembled together for that purpose within the said borough, should, and might from time to time and at all times thereafter, by themselves, and without the concurrence or assistance of the rest of the burgesses of the said borough, elect and choose such person or persons to be a burgess or burgesses of the same borough as to them should seem meet."

Now, I discover nothing illegal or unreasonable in this. If it be inconvenient, it has been well said, the same authority which made the rule, may in due form abrogate it. It seems to have been introduced to avoid confusion in the

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corporation, and that although the charter confers the right of election on the mayor, bailiffs, and burgesses generally, it has been thought better that a less number than the whole should actually make the election.

In stating this, I am stating nothing new. This was declared to be the ancient law—even before the time of Lord Coke—the ancient law used in all corporations.—[The learned Judge here stated the Case of Corporations from Coke, 5 Rep. 77, b, and then proceeded.]—This is the declared law, and it has been acted on ever since; and to be sure it is most desirable that every thing that can tend to prevent popular tumult, which is constantly occurring at the election of burgesses, where the election happens to be in the whole body of burgesses, should be enforced.

In the case of *The King v. Ashwell*, 12 East 22, the charter gives the power of electing aldermen to the mayor and burgesses of Nottingham, the aldermen were to be chosen from among them. By a bye-law made in 1577, for avoiding popular confusion and tumult: It was enacted, “on the election of aldermen, that the mayor and certain of the burgesses of the town, and the recorder, without the concurrence or assistance of the other burgesses,” (in the very words, as you see, of the present bye-law,) “should elect,” &c. In that case it was held that such a bye-law was good, for it was not cutting off any integral part, as was said in arguing the case, but it was only limiting the numbers of that body. Lord Ellenborough says it is not unreasonable, nor is it inconvenient; but, if it be found inconvenient,

his Lordship says, (as I have presumed to say,) that it is competent to the corporation, by the same authority with which they enacted it, to repeal it. Mr. Justice Bayley, on this point of inconvenience, says, that such a law binds none who succeed in the corporation, unless they choose to be bound by it. It only binds the successors of all, who choose to be bound, and the same body that passed it, may also repeal it.

The bye-law in this case also has existed upwards of one hundred and fifty years, and during that time it has never been found so inconvenient as to induce the corporation of this borough to alter it.

In the next case, *The King v. Bird*, 13th East 367, where the Court of King's Bench seems to have been composed of the same judges as in *The King v. Ashwell*, one of the questions was, Whether it was competent to a corporation at large, where the power of making elections was incident to the corporation, or was in them by prescription, to delegate it to a select part of themselves, and, consequently, whether a bye-law so made was good in itself?

As to the latter point, on which my learned brothers have spoken so elaborately, I am of opinion that it is not only a good, but a very good bye-law, calculated to exclude popular confusion in the election of burgesses, and agreeable to the doctrine of the Case of Corporations. I see no reason why it should not have been as much applicable to the election of burgesses, as to the higher orders of the corporation in the time of Lord Coke.

Therefore, in reply to the question proposed,

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but with sorrow, that I have to differ in opinion with some of my learned brothers, whose opinions I unfeignedly respect, I answer, that I am of opinion that the bye-law stated in the third plea on this record, having regard as well to the power of the corporation at large, as to the object and intention of the bye-law itself, is a good and valid bye-law.

Mr. Justice Bayley.—With very great respect for those of my learned brethren, who differ from me, and greatly regretting that I differ from them, I am constrained to say that I am of opinion this bye-law is not a legal and valid bye-law, regard being had as well to the power of making bye-laws given to this corporation by the charter mentioned in the third plea, as to the object and provision of the bye-law itself. The objections which occurred to my mind against the validity of this bye-law were mentioned by me when the case came before His Majesty's Court of King's Bench, and it would be a waste of time to repeat them. I beg, therefore, only to call your attention to those further reasons, which have struck my mind after having had the opportunity of hearing the arguments at the bar.

I propose for consideration two propositions: the first is, that where the Crown, either in an existing prescriptive corporation, or in one newly created, gives a power of making bye-laws to a select part of that corporation, it has put an end to, in a pre-existing corporation, or has prevented, in a newly-created corporation, any right of making bye-laws in the corporation at large; unless it can fairly be inferred, from the limited extent to which the power of the select body is confined,

or from the nature and importance and well-being of the corporation, that it should have a power to which the power of the select body does not extend; or that it might have been the intention of the Crown, in addition to the power given to the select body, to give a more extensive power to the body at large, as also that it was the object of the Crown that there should be such co-extensive power in the instance, in which the body at large have taken on them to make a bye-law. I mention, as my second proposition, that in this instance the objection occurs that the Crown never could have intended to allow the body at large the power of making such a bye-law as that, which has been made in the present case, the bye-law, in my apprehension, being a fraud on the constitution of the borough.

By the charter the right of making bye-laws, in this corporation, is given exclusively to the body at large, and whether the common council had or had not, from time immemorial up to the time of the charter, the same power, the third plea does not seem to state. It contains no allegation upon this point, and though I concede that the power of making bye-laws is *prima facie* in the corporation at large; yet to warrant the founding an argument, that by the charter the sole right of making bye-laws was in the corporation at large, I am disposed to think, that it ought to have been stated expressly (and not to have been left uncertain,) that the corporation had the sole right up to the time of granting the charter, more especially when the power of the select body is stated in this plea not merely in what would be the proper form, but is also confirmed

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by mention of the probable course, when such a power has been given. I cannot, however, find any express authority on this point, and I shall content myself with noticing but one or two as I pass along, it being my opinion that if the corporation at large had the right prior to the time of the charter, the effect of the charter was to alter it in conformity to the bye-law.

The power given by the charter is undoubtedly a power of making bye-laws for the government of the borough, and merely for that purpose, and no bye-law has been suggested by any of the learned Judges who have preceded me, except that which is the subject of this case, which will not be within the compass of the express power given to the select body. The power is given to enable the select body to make such bye-laws as to them may seem good, wholesome, useful, honest, and necessary, &c. &c. Now what further power could be required? Not any that I am aware of. If so, can it be supposed that the Crown could have intended that there should have been a co-existing power in the body at large, at least could it have been intended to give the power to make such a bye-law as this, constituted as this borough is? Looking at the constitution of the borough, and the nature of this bye-law, in my mind, I am led to a contrary conclusion. The borough consists, as I am bound to take it from the plea, of a mayor, bailiffs, and burgesses, with their successors, and as there is nothing to show that the freedom was to be obtained by servitude or birth, it must be by election, and by election only, that a man could become a burgess; in every case therefore the number of burgesses must depend entirely on the will of the

electors. Whether there shall be five, or fifty, or five hundred, depends entirely on them. The number of the common burgesses may be below that of the select body. It might have been so at the time when this bye-law passed; it may have been so ever since; and under such a bye-law the mayor, bailiffs, and common council all vote, and is not every one of them interested in the vote he gives? Upon the question, Whether the body at large have the right of election, has not every one of the select body an interest in saying it shall be in the fifteen, and in the fifteen only? Generally speaking, when you are voting for that which is to be for the benefit of the corporation at large, you ought to have votes given by those persons who have not an interest in the question: though in this question, when they are deciding, they have a private interest of their own in opposition to the interests of those whose rights they take away.

It is clear the bye-law is made by a select body of the corporation: not a single burgess voted for this bye-law, except those who were members of the select body. It is a specious argument, to say that the body at large, may, when they think fit, repeal the bye-law, and re-vest the right where the charter has placed it; but, it is so clearly touching the interests of the common council that there should not be any repeal, that it is not improbable they may take care that the number of burgesses shall never be able to carry the repeal into effect. Considering that the power of making bye-laws is expressly given to the select body, and by the constitution of the borough there is no power of electing burgesses

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by them; and considering that the *common council* have no power by the charter to make such a bye-law, I am of opinion that the right of making bye-laws in this borough exists only, where the charter has confined the power in question,—namely, in the select body. Every corporation has a power to make bye-laws either in the body at large or in a select part of that body; but I am not aware of any instance in which the double power has been exercised. There is no instance mentioned by any of the learned Judges who have preceded me, nor am I aware of any instance being mentioned, or that can be found; if I had known of any I should certainly have thought it my bounden duty to have mentioned it.

In the case of *Norris v. Staps*, and *The City of London v. Vanacker*, the Court held that the power of making bye-laws was incident to every corporation, either by the body at large, or by a select body; but to my mind it appears clear that it must be either in one or the other, and cannot be in both. In the case in *Hobart*, he states that every corporation has incident to it the right of making bye-laws. “For as reason is given to the natural body for the governing of it, so the body corporate must have laws as a political reason, to govern it.” He is speaking there probably of the charter of a corporation, where such power is given to the body at large to make bye-laws. In the case of *The City of London v. Vanacker*, Lord Holt speaks of the power of making bye-laws as incident to every corporation. He mentions the passage in *Hobart*, and states it at full length as bearing out

that proposition; yet he is there speaking of a case in which the right was not in the body at large, but the select body.

In the case which has been already mentioned, in 2 P. W. *Child v. The Hudson's Bay Company*, Lord Mansfield says, "a corporation "has an implied power to make bye-laws, but "where the charter gives the company a power "to make bye-laws, they can only make them "in such cases as they are enabled to do by "the charter, for such power given by the charter implies a negative that they shall not make "bye-laws in any other cases." So it is a fair and reasonable inference, that where a bye-law gives to a select body a power to make bye-laws in terms applicable to almost all the purposes to which a bye-law can, for the regulation of a body, be required, it implies a negative that there is not a co-existing power in any other body.

The case of *The King v. Head*, 4 Burr. 2515, seems to me to be a very powerful authority in favour of my view of the question submitted to us, and I am not quite satisfied whether hitherto it has had that full attention to which it is entitled; and I venture humbly to submit, that it would be as well to refer to that case, before coming to a final decision. That was the case of the corporation of Helston, where the burgesses were incorporated by the name of the mayor and commonalty, and by the charter four of the more discreet members were created aldermen, and they, with the mayor, were to be the common council, and to make bye-laws; the right of election was in the mayor and commonalty, together with the

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aldermen, and they made a bye-law, with the assent of the commonalty, whereby it was enacted, that the mayor and aldermen, exclusive of the commonalty, should elect the burgesses. The question was on the validity of that bye-law. Two objections were made; one, that it excluded an integral portion of the corporation, namely, the commonalty: but upon this point, as far as I can collect it from the Report, the judgment of the Court does not appear to me to have proceeded. The other objection was, that the assent of the commonalty could give no title. I should wish you to see the manner in which that point was argued, before you determine on this case, for the purpose of ascertaining what it was to which the opinion of my Lord Mansfield was directed. Mr. Thurlow's argument was, that the assent of the commonalty would be of no effect, "that it was null and void, and cannot bind their successors. The power of making bye-laws is given, by the charter, to the mayor and aldermen only; the commonalty have no authority to interfere at all in that matter. It is not within their province; they could not be summoned for such a purpose; nor, if they were summoned, could they do any single act that could be valid, in relation either to the making bye-laws, or assenting to, or dissenting from them. All their acts of that kind would be nugatory, null, and void; as they have no sort of power to meddle therein."

Then he draws this as a consequence; he says, "consequently this bye-law is to be considered as made by the mayor and aldermen alone; and the addition of the words 'with the assent of

“ the commonalty, ’ makes no difference nor carries any real meaning; because they had no concern in what was transacted, any more than any other person, or even an absolute stranger to the corporation.”

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Now, what says Lord Mansfield on this mode of argument? Does he except to any part of it? When it is asserted, that the commonalty had no power to interfere in the matter, that they could not be summoned for any such purpose, either to make a bye-law or to dissent from it; does he interfere either to qualify it or the reverse? No, he stops Mr. Thurlow, who was pursuing that argument, and says, “ the body at large have no power of making bye-laws, because that power was by the charter given to the common council.” That was one of my Lord Mansfield’s consequences; it is a power given to the common council to make the bye-laws, and the commonalty had no right to interfere, they had nothing to do with making bye-laws; consequently, he says, the common council could not by a bye-law take away from the body at large that right which the charter had vested in the whole body. This, as it seems to me, is the single ground given for the decision. It was on this, and on this alone, that it professes to be founded. If it be so, is it not an authority on the very point which you are considering; is it not a decision of the Court of King’s Bench expressly on that point? It is said there is an objection to that bye-law; it purports to be made by the mayor and aldermen, with the assent of the commonalty, but the commonalty had not otherwise interfered. It is supposed in after-times, but I cannot believe

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that this is the foundation of Lord Mansfield's decision.

Now I would ask, whether Lord Mansfield could have entertained a notion that there was a double power given to the corporation, which was a corporation by prescription, and afterwards incorporated by the name of the mayor and commonalty. There is not a hint from him, that in order to have made it a valid bye-law, it should have been made by the mayor, common council, and burgesses. On the contrary, he says, in very distinct terms, that the commonalty had no power.

For that reason I think this bye-law is not valid. If it had occurred that a bye-law of this description could have been made by the corporation at large, would it not have been probable that they would have put it in that way on the pleadings? It appears to me that that case is a very powerful authority on the present question; and on the whole, there being no instance in which there has been a double power exercised, and it appearing that there is nothing pointed at in this case to which the general power of the body at large would have been applicable, except a bye-law of this nature, and as the charter in this case in distinct terms gives a right of election to the mayor, aldermen and burgesses; I am of opinion that the corporation have not the power of making such a bye-law, and that it is therefore illegal and void.

Lord Chief Baron Alexander.—I am one of those who are of opinion, that the question which has been put ought to be answered in the affirmative; and as I concur in many of the reasons which have been already given for this opinion, it will be the less incumbent upon me to explain

them fully; though at the same time I feel it my duty to point out shortly that course of reasoning which appears to me to warrant the conclusion to which my mind has come.

The bye-law was made, as stated in the third plea, by the mayor, bailiffs, and burgesses of the borough, that is, by the persons to whom the charter is addressed,—by the body at large. It appears to me to be a settled principle pervading the whole law on the subject of corporations, that a power to make bye-laws is incident to every corporation. It is so expressly laid down in the Launceston case, in 1st Rolle's Abridg. 513, one of the earliest authorities referred to upon this subject, and which is always acknowledged, whenever there is occasion to allude to the point, and has not, that I know of, been ever doubted, much less contradicted. The bye-law, therefore, being the act of the whole incorporation must be valid, unless some one of the objections that have been made to it shall appear to have been well founded. I concur in none of them, and in consequence agree with the two learned judges of the King's Bench, who decided for the Defendant on the third plea. This is the general view which I take of the question.

Three objections have been made to this bye-law; one of them is founded on a supposed want of power in the body which enacted this bye-law to make any law; and the two others are founded on a supposed illegality in the object and provisions of the bye-law itself. No other question of any importance has been suggested. The objection to the power of the enacting body depends, as it seems to me, entirely upon the effect of the

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charter of Charles II., and the acceptance by the old corporation of that charter. It is said, that this charter confers upon a select body, namely, the mayor, aldermen, and bailiffs, being the common council, full power and authority to constitute and ordain all reasonable laws, statutes, and ordinances, according to their discretion, and then, without denying that there was incident to the incorporation a power to make bye-laws, the argument insists that this incidental power ceased in the body at large, by the acceptance of the charter, conferring on the select body the same authority. A satisfactory answer, as it appears to me, has been given to this argument. Though the clause conferred a power of making bye-laws upon the select body, it still remains to be determined to what subjects that power, according to the true construction of the charter, extended. That point must be determined : because if the authority to make bye-laws, bestowed on a select body, be limited either by the express terms of the grant itself, or be limited by the construction which the general terms used ought to receive, it follows, as it appears to me, that the implied revocation of the powers, previously existing in the incorporation at large, must have the same limitation. The previously existing powers are revoked or extinguished, so far only as they are or can be conferred on the select body. Such is the nature, I think, of all implied revocation.

Without entering upon any analysis of the language employed in the charter for bestowing on the select body the power to make bye-laws, I may observe, that there is not in it any one

specific expression pointing at this subject, and if it be sought for there at all, nothing but general expressions can be pointed out as conferring it. I will not enquire what ought to be the consequence of a power given, in unequivocal and express terms, to a select body to legislate on such a subject as this; but, which is of more importance, I will request you to recollect, that it is expressly decided, that the ordinary case of an authority given in general words, as here, will not by law warrant an ordinance, made by the select body, to limit the powers of the general body on a material point. This is the rule laid down in the Maidstone cases,—*The King v. Spencer*, and *The King v. Cutbush*, in Burrows. This is the point decided by them, and perhaps, they ought not to be considered as deciding any thing else, but they are always treated as fixing that point. Therefore, in the present case, the select body had not, by the charter, nor by law, the authority to make the ordinance now in question. The consequence is, that according to the principles I have mentioned, the authority to make such a bye-law continued in the corporation at large, if ever it resided there.

In answer to the assertion, that the power in the select body, conferred by the charter, would deprive the general body of that power, which the general law respecting corporations confers upon them; it is my humble opinion, that no power of making any such bye-law was conferred by the charter on the select body, and, therefore, that it could not deprive the incorporation at large of the power, which they before had, of making such a bye-law as that now in question.

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It would not be difficult for me to unfold this argument more at large : but I shall not occupy your important time in doing so. I avow that I have adopted my view of this part of the subject from the reasons of one of the learned judges who decided this case below,—a judge equally distinguished for the depth of his knowledge and the solidity of his understanding,—whose infirmities have withdrawn him from the public service.

I am not citing this opinion as authority ; I do not forget that this opinion is, at the present moment, under review : I am not using the *exceptio ejusdem rei cujus petitur dissolutio* ; I mention it only lest it should seem that I have passed too rapidly over an important part of this question ; for I have done so to economize the time of the House, feeling, as I do, that the observations which have affected my mind are to be found in the opinions to which I have alluded.

I will only say, the argument on the other side rests on the hypothesis, that the Crown intended to give the power to the select body. It appears to me a strange hypothesis, that the Crown should have intended, or be considered to have intended, by certain words to confer a power, although it has been decided, that these words though used by the Crown, will not give such a power ; and upon that hypothesis to take away a power which, it is admitted, would otherwise reside in the body at large. I conclude, then, on this point, that as the authority to legislate on this subject must reside in the incorporation at large, or no where, that the incorporation had that authority which is now denied to them, and

that the want of authority is not a good objection to this bye-law.

The next objections are to the objects and provisions of the bye-law; they are two. The first I shall notice is, that the bye-law disfranchises an integral part of the corporation. Now with respect to that objection, I think I need hardly trouble the House. As I see it has not been proceeded upon by my learned brothers, who have given their opinions in this case, I shall not do more than say, that it appears to me, that this matter is to be considered, as if the bye-law had enacted that the burgesses should in future be chosen by the mayor, bailiffs, and such of the burgesses as should be aldermen. I think you have it so expressed, and it is clear there is no objection to it.

The third, or last objection, seems to me the most important of all; it touches somewhat the political considerations which may be permitted to mix themselves in these questions.

It is said, that the decisions, which have supported bye-laws limiting the number of electors, are confined to the election of officers of the corporation; to them somebody must be nominated, and the question is, who? which is of inferior consequence; but that upon this question it depends of how many the body itself shall consist, which is of superior importance, and affects the constitution itself; that in the present case the alteration is made in such a way, as in all probability to limit much the number of the corporation, and by that means, to prevent the bye-law from being ever revoked, without the consent of the

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select body, to whom the authority is delegated. This is urged as being a fatal objection to the principle of the bye-law. The distinction taken is between a law regulating the election of a superior officer, and one regulating the election of burgesses, who, individually, constitute the body at large.

Several observations made in answer to this view of the subject have prevented my adopting it ; the first is, that it is entirely new. No such distinction, that I have been able to discover, was ever pointed out until *The King v. Bird*, before Lord Ellenborough, the last case before the present. The language, respecting the power in corporations to limit the number of electors, is always general. From the Case of Corporations downwards, that is, from 1598, for two hundred years, in all the various questions that have arisen respecting limitations imposed by ordinances on the number of electors, no counsel, no judge, that I have been able to discover, ever alluded to such a distinction. It is difficult not to doubt the soundness of a distinction, which appears to have escaped many considerable men during ages, though their attention was called to subjects closely connected with it. It is quite true, as has been observed, that almost all the cases related to the election of officers ; but it is equally true, that the principles on which those cases were decided, whether the bye-law was approved or condemned, applied generally to all elections, and that neither by way of argument or illustration is any difference made between the election of an officer or of a burgess. I have said, that

almost all the cases related to the election of officers. This is not universally true; the cases of *The King v. Head*, and *Hoblyn and others v. The King*, in this House, are cases in which the controversy related to the election of burgesses. They are in effect the same cases, but they came in a different form, and were argued before different tribunals. Looking through these arguments you will find the same cases cited, the same principles insisted upon, as in the usual debates upon the bye-laws regulating the election of officers; and, as far as we can guess, from the reports that have been handed down to us, the cases were decided exactly upon the same grounds.

In *The King v. Head*, Lord Mansfield says, in 4th Burrows, 2521, "This is exactly the Case of Maidstone." It was a very short case,—in substance it was this:—the charter gave the power of electing burgesses to the mayor, aldermen, and commonalty; it gave the power of making bye-laws to the mayor and aldermen. The mayor and aldermen made a bye-law displacing the commonalty from the exercise of this function. Upon the ground that it did displace an integral part of those to whom the charter confided this function, the bye-law was held to be invalid. It occurred to no man, counsel or judge, to state that the subject, the election of burgesses, was one which could not be touched by any bye-law. It seems impossible, if such a principle had been present in their minds, that it should not have come forth on that occasion.

The latest case, except the present, *The King v. Bird*, before the King's Bench, in the time of

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Lord Ellenborough, is a positive decision in favor of my view of the point which I am now discussing. It is nearly, and as it seems to me, in a very material respect, the same case as that which is now before you; the controversy regarded the election of a burgess and not of an officer. There, for the first time in argument, the distinction between the election of an officer and the election of corporators is brought forward by Mr. Dampier, one of the counsel; it no sooner appears than it is crushed. Lord Ellenborough says, "it is calculated to exclude popular confusion in elections, a principle which was long ago established in the Case of Corporations, and I see no reason why it should not have been as much applicable to the election of burgesses at large, as of the higher orders of the corporation, in the time of Lord Coke." Such is the reception which this distinction receives, when it first presents itself at this late period. I trust, therefore, it will not be thought that I have rashly represented this distinction between the election of officers and the election of corporators, as having no foundation on any ancient authority, and as contradicted by some of our modern ones. These circumstances, I humbly submit, constitute a strong argument against it.

It will be proper to inquire shortly, whether this distinction is better supported by the principle of the decisions than it is by their language? One prevailing reason for this license to alter, in some degree, the constitution of a corporation as to elections, pervades every authority on the subject. It is announced in the Case of Corpora-

tions, 4th Coke, and re-appears whenever the subject is mentioned. The authority is given by the law, for the avoiding of popular disorder and confusion. To alter the mode of election prescribed by the charter is beyond all dispute a variation of the constitution in every case; but the law allows and supports it for the important reason given. We should therefore *primâ facie* allow a law to be supported, whenever the reason exists. Does it not exist in the case of corporators as much as officers annually or otherwise chosen? Are the people of this country so ignorant and short-sighted as not in many cases to know and feel, that, upon the event of the election of corporators, other more permanent and seemingly important elections may depend. It would be wasting words to employ more in reminding you that every mischief, which it is the object of this rule of law to remedy or to prevent, is as likely to occur in the election of corporators as of bailiffs, aldermen, or jurats, to whom it is wished to confine it. It seems to me, therefore, that this case, being within the general mischief, is within the general remedy.

I am fully sensible of the force of the observation, that it seems contrary to the spirit of corporation law to permit any alteration of the original constitution given, or presumed to be given, by the Crown. This is an observation calculated to strike all men the instant it is made, but it is corrected by reflection and inquiry. You find upon examination that the law does permit the body to alter its constitution for wise and salutary purposes. This has been done for ages, allowed by

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the Judges after mature deliberation centuries ago, approved by many eminent lawyers in succession, and objected to by none. Who can deny that it is an alteration of the constitution of a corporation to deprive many electors of the right of electing all the officers of the corporation, from the highest to the lowest? Yet it is acknowledged this may be done.

The question, therefore, I put to myself is, whether this alteration is not justified by the like reason? It appears to me to be so. What Lord Mansfield said in the case of *The King v. Spencer* in Burrows, respecting bye-laws, may surely be applied with great weight to the election of corporators. His words are these,—“where the power of making bye-laws is in the body at large, they may delegate their rights to a select body which become the representatives of all the community.” Here the body at large have delegated their right of electing burgesses to a select body, and the select body are in that respect the representatives of the whole community.

There remains to me but one objection more to notice,—it is, that this bye-law is so contrived, that it will not probably be revoked. The select body will so manage as to be at all times the majority of the burgesses, and to preserve the power, which the bye-law has placed in their hands. I confess that although this is but speculation, I do not consider it is any disadvantage. If it was beneficial to enact this law, if its effect was useful, it would seem that its endurance should be beneficial too. The acknowledged principle, which has hitherto supported every bye-law of

the kind when enacted by competent authority, is the preservation of order in the community, and the exclusion of riot and commotion; the same principle should lead us to consider any regulation which has a tendency to produce that effect permanently, as the more meritorious on that account.

For these reasons I presume to give my opinion, that this is a good and valid bye-law.

When the Judges* had delivered their opinions, the *Lord Chancellor* after stating the course which the proceedings had taken; the question put to the Judges; the difference of opinion among them, and the great importance of the case, proceeded to move the adjournment of the question, on account of the extensive nature of the subject and its difficulty, in order that the House might have the opportunity of examining the authorities and reasons, and weighing the opinions which the Judges had delivered.

In this motion *Lord Tenterden* concurred, because the question, as it appeared to him, was one of great doubt upon the authorities which had been cited and examined by the Judges.

The case was then adjourned *sine die*.

On the 21st of July 1830, *Lord Tenterden*, in moving the judgment, stated shortly the case as it appeared on the Record, and particularly the parts of the charter of Charles the Second which

* Tindal, C. J. having been counsel in the cause, did not deliver any opinion.

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empowered the mayor, bailiffs, and burgesses, to elect future burgesses, and the mayor, aldermen, and bailiffs to make bye-laws; and then after stating from the plea of the Defendant, the bye-law made by the body at large restricting the power to elect burgesses to the mayor and common council without the concurrence of the rest of the burgesses, and the election of the Defendant to the office of a burgess by the mayor and common council, he proceeded as follows:—

This charter of Charles the Second is referred to in another part of the proceedings, and inasmuch as that charter contains a clause enabling the corporation at large to elect the burgesses, the defendant has on one part of the record alleged, that the corporation did not accept the charter as to that part of it which gave the power of electing the burgesses to the body at large. Two questions of law, therefore, have arisen upon this record—the first, whether it is competent to an existing corporation, to whom a charter of the Crown is offered, to accept that charter in part, and reject it in part; or, if it accept it in part, whether that must not be taken to be an acceptance of the whole? Upon that point there never has been any difference of opinion among the learned Judges. There are, indeed, to be found some expressions of the Judges in former times, importing that a corporation might accept part of a charter, and reject the remainder; but of late times, all the Judges have been of opinion that that is not open to a corporation, otherwise a corporation might reject the obligation which was imposed, and accept the benefit which was conferred

upon them ; and accordingly there was judgment in the Court below for the Crown upon that, (namely) that the allegation that the charter was accepted in part, was a bad allegation.

Upon the question as to the bye-law, there has been a difference of opinion. A very considerable majority, however, of the Judges have been of opinion, that this is a good bye-law : it was so held by a majority of the Judges of the Court of King's Bench, and I, having been one of the Judges, who, on the first occasion felt a great doubt, have now arrived at the conclusion, that the opinion of the majority of the Judges, is well founded.

That question arises in this way. It is admitted on the pleadings, that the Corporation of Chepping Wycombe has existed from time immemorial. To such a corporation it is incident, that the whole body should have the power of continuing itself and giving itself perpetual existence, which is incident to a corporation ; but inasmuch as in this charter of Charles the Second a special power of making bye-laws is given not to the body at large but to a select body, it became a question, whether that might not by implication take away the power of making bye-laws which had previously existed in the body at large ? But the majority of the Judges, upon a view of this bye-law, and upon considering its terms very maturely, have been of opinion that the charter did not give the power of making bye-laws for the election of burgesses to the select body, so as by implication to prevent the body at large from making the bye-law in question ; that was a question certainly of great importance.

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I myself, as I have stated, entertained considerable doubt upon it, when the question was before the Court. A majority of the Judges, however, have been of opinion, that the power of making bye-laws by the select body, not being inconsistent with the power of making bye-laws in the body at large on the subject of the election of burgesses, that power was not taken away.

I have had some communications with the Lord Chancellor upon the subject, and I find he is also of that opinion; and upon a full consideration, I have also come to the same conclusion. Some few of the Judges were of opinion that such a bye-law could not, under any circumstances, be good—that is, that the corporation at large could not, under any circumstances, transfer the power of electing from themselves to a definite portion of their body. There have been, however, so many decisions upon this point, and so many bye-laws have been held to be good, which, if this were bad, would be also open to objection, that I have no difficulty in saying, that, (referring to the particular charter of this corporation,) I concur in the opinion of the majority of the Judges, and of my Lord Chancellor, that it is a good and valid bye-law, as it was held by the Court below to be,—I therefore recommend to your Lordships to affirm the judgment of the Court below.

Judgment affirmed.

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(COURT OF EXCHEQUER.)

ALFRED EYLES DAVIES, AMBROSE }
EYLES, and JANE PARRY EYLES, } *Appellants.*

ELIJAH BUSH, THOMAS SEARGEANT }
and CHARLES MORTIMER - - } *Respondents.*

A. by his will bequeathed to S., his partner in trade, certain leasehold premises where the trade was carried on, for the residue of the term and interest of the testator therein. These premises, together with other premises at H., were subject to mortgages for monies which had been raised and charged upon them by the testator, who had also given his bond for the debt.

Upon a bill filed by pecuniary legatees against the executors, to carry the trusts of the will into execution, and a decree for taking the accounts of the estate, it appears that S., who was one of the executors, had paid off the sums due upon the mortgage of the premises at T. and H. out of the personal estate, which was insufficient to satisfy all the debts and pecuniary legacies. This payment was allowed by the Master in his report. The report in this respect was confirmed by order upon further directions, and upon appeal the decision was affirmed.

IN the month of June, 1820, the Appellants filed their bill against the Respondents, stating the will of Charles Bythessea, dated the 3d of October, 1819, which will recited, that the testator, having

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survived his late wife, became entitled to an estate in fee simple, and had power to dispose of a farm and premises called Hayse, in the Parish of Bradford in the County of Wilts; and the testator thereby devised and bequeathed unto the Defendants Elijah Bush and Thomas Seargeant the said farm, and hereditaments, and all other his estate called Hayse, upon trust to sell and dispose of the same: He also devised and bequeathed unto them all other his real and personal estates, upon trust to get in and receive all such parts of the said estate and effects, and to sell and dispose of such parts thereof as might not consist of money, and to stand possessed of such monies as may arise from the sale of the estate called Hayse, or otherwise, after payment of all his just debts, funeral and testamentary expences, upon trust, as to 4,000*l.*, part thereof, to put and place the same out at interest on securities; and when his nephew the Appellant Alfred Eyles Davies should have executed, to the testator's heirs, executors, or administrators, a release of all claims or demands which the Appellant had or might have against the testator, as one of the executors of the late Mr. Eyles, his grandfather, or otherwise, to pay and apply, or permit and suffer the Appellant to have, receive, and take to his own use the interest, dividends, and annual produce of the said sum of 4,000*l.* for and during his natural life; and after the decease of the Appellant, then in trust for such one or more child or children of the Appellant, in such shares or proportions, and under such restrictions and limits as the Appellant should at any time by deed or will give,

limit, bequeath, or dispose of the same to or in favour of such child or children, or his or their issue ; and for want or in default of such disposition, then in trust for all the children of the said Appellant ; and in default of such child or children, and his, her, or their issue, then in trust for the Appellant Ambrose Eyles, nephew of the said A. Eyles ; and in case of the death of the Appellant Ambrose Eyles during the life of the Appellant A. E. Davies, without leaving issue or any descendant of such issue, that it should be lawful for the Appellant A. E. Davies, by deed or will, to direct the said 4,000*l.* trust money to be paid and disposed of in such manner, at such times, and in such shares and proportions, in favour of and for the benefit and advantage of some of the relations by blood of the said William Eyles, his father, grandfather, or one of them, as he might think proper : And upon trust as to 5,000*l.*, further part of such trust-monies, he directed that the said trustees should put the same out at interest in the public stocks or on mortgages, with the consent of Elizabeth Williams, the said testator's niece, upon trust to pay or permit the said Elizabeth Williams to receive the dividends and interest thereof for her separate use during her life, and after her decease, then upon trust to pay the interest and dividends thereof to her husband Captain Williams for his natural life, and after their deaths, then the principal to the use and benefit of one or more of the children of the said Elizabeth Williams, his, her, or their issue, in such shares and under such restrictions as she should by deed or will appoint, and in default of such appointment, in trust for such children or child : And the

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testator gave and bequeathed unto the Appellant Jane Parry Eyles, described as the wife of the Appellant Ambrose Eyles, the sum of 200*l.*, and unto the Respondent Elijah Bush the sum of 100*l.*: And he directed that immediately or as soon as convenient after his decease his affairs in trade should be wound up and settled by his friend andartner Thomas Seargeant, in whom he reposed full confidence for the settlement thereof; and he directed that the balance of his the testator's share and interest in such trade, after the same should have been ascertained and struck for the said Thomas Seargeant, should be paid to his executors in the manner and at the times therein-after mentioned; that is to say, one-fourth part thereof in twelve months, one-fourth part in eighteen months after his the testator's decease, one-fourth part in twenty-four months, and the remaining part thereof in thirty months after his decease; and it was his will and desire that his said partner Thomas Seargeant should not be liable or required to pay any interest upon the said monies for the periods during which the same would remain in his hands: And after reciting that the dwelling-house, shops, and premises situate in Trowbridge, then occupied by Thomas Seargeant, were held for a term of years, part of which was then to come and unexpired, the testator declared it to be his will and desire that Thomas Seargeant should have, hold, and enjoy the said dwelling-house, shops, and premises for the remainder of the term, the said Thomas Seargeant exonerating the testator's executors from the rent, covenants, conditions, and agreements contained in the said lease; and the testator

thereby gave and bequeathed the said lease and his interest therein to Thomas Seargeant; and he gave, devised, and bequeathed unto Thomas Seargeant, his heirs and assigns, the dye-house, with the furniture and fixtures belonging thereto, from the store and newly-erected work-shops and buildings, with the appurtenances, in Trowbridge, for the residue of his estate; and he declared that it was his intention to give and dispose thereof by some codicil or codicils to his will; and he appointed the Respondents Elijah Bush and Thomas Seargeant joint executors of his will.

The testator afterwards made several codicils to his will, by one of which, bearing date the 6th day of January, 1820, he gave and bequeathed to Thomas Seargeant all his share, right, and interest to and in all the looms, carding machines, scribbling jennys, and other machinery which might be left at his decease, for Thomas Seargeant's sole use and benefit; and what might remain of his effects, after all the above should be paid off, he directed should be divided into three parts, two of which he gave and bequeathed to his nephew, the Respondent Charles Mortimer, and the other he gave and bequeathed to his executors, in trust for the use of the society for the Propagation of the Gospel and Christian Religion in Foreign Parts, the Bath General Hospital, or any other charity which they should think most beneficial to mankind.—By a postscript to this codicil the testator directed 200*l.* to be appropriated to build a school at Atworth, for the accommodation of educating the poor, subject to such trusteeship as his executors should appoint.

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By another codicil, bearing date the 26th of January, 1820, attested by three witnesses, the testator desired that his executors should, out of his residuary estate, reward and settle with all his servants, and Farmer Oram, Elizabeth Underwood, Sarah Webb, and such other persons as his executors might judge to have claims upon him for their services or gratuitous kindness and attention to him; but his executors were to act therein according to their own judgment and discretion: He gave and bequeathed unto his very worthy friend and partner all his share and interest in all looms, carding machines, scribbling jennys, and other machinery, for his own use and benefit; and as to all the remainder of his residuary estate and effects, he directed the same to be disposed of as directed by a paper writing thereto annexed in his own hand-writing, bearing date the 6th of January, 1820, and by such other writing as he might annex to his said codicil, or leave at his death; and he ratified and confirmed his will.

The bill then stated the death of the testator in February, 1820, and that he left the Respondent John Lewis Bythessea his heir at law, and that the will and codicils were proved by the Respondents Bush and Seargeant, who possessed the testator's personal estate, and were in receipt of the rents of his real estates.

The bill further stated, that John Williams and Elizabeth his wife had issue one son only, an infant, who with the parents were abroad; that the Appellants Ambrose Eyles and Jane Parry his wife had not any issue; that the Appellant

Alfred Eyles Davies was unmarried, and was entitled to have the legacy of 4,000*l.* secured; and that the Appellants Ambrose Eyles and Jane Parry his wife were entitled to the legacy of 200*l.*

The bill charged, that if the personal estate of the testator should be insufficient for the purposes directed by the will, a competent part of the real estate should be sold in aid thereof, and that after sale of a competent part the unsold real estate, or the money to be produced by the sale of the real estate, which should not be required to be applied in aid of the personal estate, would belong to the Defendant John Lewis Bythessea, the heir at law of the testator, as a resulting trust.

The bill prayed, that the will might be established and the trusts performed; and that an account might be taken of the rents and profits, and of the capital stock of the testator in his trade, and of his personal estate and effects, which had come to the hands of the Respondents Elijah Bush and Thomas Seargeant, or which without their wilful neglect or default they might have received, and the application thereof, and an account of the debts of the testator, and legacies given by his will; and that the legacy given to the Appellant Alfred Eyles Davies might be secured on the trusts of the testator's will; and that the Appellants Ambrose Eyles and Jane Parry his wife might be paid the legacy of 200*l.*; and if necessary, that the real estates of the testator, or a sufficient part thereof, might be sold in aid of the personal estate; and that such of the real estates, and the money produced by the sale thereof, which should not be applied upon the

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trusts of the testator's will and codicils, might be declared to be a resulting trust for John Lewis Bythesea, the heir at law of the testator; but if the Court should be of opinion that the Respondent Charles Mortimer was entitled under the will and codicils, as well to two third parts of the testator's residuary real estate as of his personal estate, then that the other third part of the residuary real estate might be declared to be a resulting trust for John Lewis Bythesea, the heir at law of the testator, and paid to him accordingly.

The Defendants having put in their answers to the bill, which were replied to, the cause was heard on the 5th of July, 1822, when it was by the decree referred to the Master to take an account of the personal estate and effects of the testator, come to the hands of the Respondents, the executors, and of the debts of the testator, and of the legacies given by his will, and of the rents and profits of the devised real estates; and a distinct account was to be kept of such rents and profits, and of the personal estate; and it was ordered that the estate called Hayse should be sold; and further directions and payment of costs were reserved.

The Master, by his report, dated the 21st day of January, 1828, found that the Respondent Elijah Bush had received on account of the personal estate, and had paid monies on account of debts and otherwise, leaving a balance in his hands, in respect to the personal estate, of 263*l.* 10*s.* 2*d.*, and that the Respondent Thomas Seargeant had a balance in his hands, on account of receipts and payments of the personal estate, of 338*l.* 15*s.* 10*d.*;

and the Master found, that by former separate reports made in the cause the testator was, at the time of his death, indebted to John Spearing in the principal sum of 3,000*l.*, which, with interest, amounting together to 3,567*l.* 5*s.* 1*d.*, had been paid to him out of the purchase money of the Hayse estate, which had been paid into Court by the purchaser, and that the testator was indebted to several other persons, and in the several sums mentioned in the fifth schedule of his report, and that he had computed interest on such of the debts as carried interest, the whole amount of which debts, principal and interest, was 644*l.* 8*s.*; and the Master found, that the Appellant Alfred Eyles Davies had not executed any release agreeably to the stipulations contained in the testator's will in that behalf; and with respect to the legacies, he had calculated interest to the date of his report, including interest on the said legacy of 4,000*l.*, in case the Court should be of opinion that the Appellant Alfred Eyles Davies was entitled to interest thereon, and he found that such legacies and interest amounted to 11,890*l.* 14*s.* 10*d.*; and he certified that no debt had been claimed before him, except those in the fifth schedule; and with respect to the rents and profits of the devised estates, down to the time when the purchaser was let into possession, he found that the balance of receipts and payments of the Respondents Elijah Bush and Thomas Seargeant, due from them, amounted to 73*l.* 9*s.* 5*d.*; and the Master certified that he had proceeded to the sale of the estate called Hayse, and that the same had been sold to James Collins for 3,500*l.*, who had paid the purchase money into Court, which had been invested

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in the purchase of stock, but which had been since sold out, and the produce paid to the said John Spearing; and the Master found, besides some outstanding personal estate of the testator, there was standing in the name of the Accountant General, in trust in the said cause, the sum of 2,692*l.* 6*s.* 11*d.* Bank 3 per cent. reduced annuities, and the sum of 168*l.* 11*s.* 3*d.* cash, balance of dividends, which bank annuities had arisen from the several sums of 2,600*l.*, 288*l.* 6*s.* 7*d.*, and 36*l.* 4*s.* 7*d.* cash, part of the testator's property paid into Court by the Respondents.

The cause came on to be heard, for further directions, on the Master's report, on 28th April 1828, when it was ordered and decreed that the report should be confirmed, and it was referred back to the Master to inquire and report what balances were in the hands of the Respondent Thomas Sargeant, or of any other person by his order or for his use, at the end of twelve, eighteen, twenty-four, and thirty months respectively after the decease of the testator, in respect of the receipts and payments of the Respondent Thomas Sargeant during those respective periods, in regard to the testator's share and interest in trade; and in making such inquiry the Master was to make to the said Respondent all just and reasonable allowances for payments made by him, or by any other person or persons on his behalf, in respect of the testator's share and interest in trade: And it was further ordered and decreed, that one fourth part of what the Master should find to have been the balance in the hands of the said Respondent at the end of twelve months after the testator's decease be carried over to the debit of the said Respondent's general exe-

utorship account at the end of the said twelve months; and that one other fourth part thereof, together with two fourth parts of the balance which he said Master might find to be in the hands of the said Respondent at the end of eighteen months after he said testator's decease, be carried over to the debit of the said account at the end of the said eighteen months; and that one fourth part of the balances, and three fourth parts of any further balance which the Master might find to be in the hands of he said Respondent at the end of twenty-four months after the said testator's decease, be carried over to the debit of the said account at the end of he said twenty-four months; and that the remaining fourth part of the said three balances, together with he whole of any further balance which the said Master might find to be in the hands of the said Respondent at the end of thirty months after the testator's decease, be carried over to the debit of the said account at the end of thirty months after the testator's decease; and if it should appear that the Respondent had not received the whole sum due to the estate of the said testator, in respect of his share and interest in trade, at the end of thirty months, then the Master was to inquire and report to the Court what further balances came to the said Respondent in respect thereof, and at what times; and such further balances were to be carried over to the debit of the said Respondent's said executorship accounts at the respective times when they should appear to have been received by the said Respondent, after all allowances: And it was referred back to the Master to take the account of the receipts and payments of the Respondent Thomas Seargeant, as one of the execu-

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tors of the testator, with annual rests, regard being had to the aforesaid directions: And it was ordered that the Master should take an account, with annual rests, of the receipts and payments of the Respondent Elijah Bush, the other executor of the testator, on the footing of the accounts stated in the Master's report of 21st of January then last, and schedules thereto: And the Respondents Thomas Seargeant and Elijah Bush were forthwith to sell the testator's moiety of the policy of insurance on the life of Robert Fry: And it was referred back to the Master to calculate subsequent interest on the testator's debts and legacies: And if the Appellant Alfred Eyles Davies should elect to execute a release of all claims or demands which he might have against the estate of the testator Charles Bythesea, as one of the executors of the late Mr. Eyles, the Appellant's grandfather, or otherwise, then and in that case the Court declared that the Appellant Alfred Eyles Davies was entitled, upon execution of such release, to interest on the legacy of four thousand pounds bequeathed to him by the will of the testator Charles Bythesea, from the end of one year after the said testator's decease: And it was referred to the Master to tax the Respondent John Lewis Bythesea his costs of the suit: And the Accountant General was to sell so much of two thousand six hundred and ninety-two pounds six shillings and eleven-pence Bank annuities, to raise the amount and pay the same, and the bill was ordered to be dismissed as to him.

It is to be observed, although the fact does not appear distinctly either in the pleadings or in the Master's report, that the freehold premises at

Trowbridge, devised to the Respondent Thomas Seargeant, as well as the estate called Hayse, were affected by a second mortgage to John Spearing, for securing two thousand pounds and interest, for which the testator had also given his bond. This debt of the testator, so secured, was paid by the Respondents, as executors, out of the testator's personal estate, and this payment was allowed by the Master as a proper payment. It was however contended on the part of the Appellants, on the hearing for further directions, the general personal estate, and the clear produce of the estate called Hayse, being insufficient to pay all the debts and pecuniary legacies, that this mortgage ought not to have been paid out of the general personal estate, but ought to have been thrown in the first place upon the mortgaged premises at Trowbridge, so devised to Thomas Seargeant, to the full extent of their value, or at least that those premises ought to bear their rateable proportion of the mortgage. But the Lord Chief Baron having expressed an opinion against the claim, and having therefore refused to introduce any declaration respecting it in the decree on further directions, the Appellants presented this appeal to the House of Lords.

For the Appellants.—*The Solicitor General and Mr. Tennant.*

By the effect of the judgment of the Court below, the premises in Trowbridge were exonerated from the payment of the debt due to Spearing, which was secured, as well on the estate of the testator called Hayse as on his premises at Trowbridge; and the Respondent Thomas Seargeant, as the specific legatee of that property, took

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it subject to the incumbrance, or at any rate he was bound to contribute towards payment thereof; and the whole of such mortgage debt ought not to have been thrown on the estate called Hayse.

By the effect of the decree on further directions, the Respondent Thomas Seargeant is permitted to retain monies of the testator in his hands, without interest, for longer periods than were authorized by the testator's will or by the principles of the Court.

The decree has not directed the Master, as it ought to have done, to compute interest on the balances which he should find to have been from time to time in the hands of the Respondents, the executors.

For the Respondents.—*The Solicitor General* and *Mr. Simpkinson*.

The money due on the mortgage was a debt due from the testator by bond as well as mortgage, and upon the true construction of the will of the testator none of his pecuniary legacies were payable until after all his just debts, funeral and testamentary expences, should have been paid and satisfied out of his general personal estate, and the money to be produced by the sale of the estate called Hayse.

In all cases a specific devisee or legatee is entitled to have the property specifically devised or bequeathed to him exonerated from all charges created thereon by the testator out of his general personal estate, and particularly where the testator has by his will directed his debts to be paid out of those parts of his property not specifically devised or bequeathed.

At the conclusion of the argument the decree was affirmed without observation.*

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* This doctrine seems to have been established in the time of Lord Nottingham. It applies only to cases where the debt has been contracted or is adopted by the testator. In 2 Atk. 436, Lord Hardwicke says, it had been determined by Lord Nottingham that a devisee of part of the real estate, subject to a mortgage, was entitled to have it paid off out of the personal estate, and that this opinion had been followed ever since.

The rule applies although the land is devised subject to the incumbrance—*Serle v. St. Eloy*, 2 P. W. 386.—although the personal estate is bequeathed for other purposes by the will, and the real estate is charged with the payment of debts, unless the personal estate is expressly exonerated. *Ancaster v. Mayer*, 1 B. C. C. 454; *Brummell v. Prothero*, Id. 111; 1 Cox. 185; and see Dict. of Ld. H. 3 Atk. 202.

A term of years created by demise to trustees for payment of debts and legacies, after the death of the lessor, will not exonerate the personal estate—*Cook v. Goavas*, cited 9 Mod. 187; nor will it be exonerated although the provision for the debt is made by a trust estate of the inheritance. *Lovat v. Lancaster*, 2 Vern. 183.

If the personal estate is deficient, lands devised for the payment of debts, and lands specifically devised subject to debt, must be applied in exoneration of the estate devised subject to the mortgage. *Serle v. St. Eloy*, *quâ supra*; *Howell v. Price*, 1 P. W. 291, and cases cited in the Note; *Bartholomew v. May*, 1 Atk. 487; *Bateman v. Bateman*, 1 Atk. 421; *Tweedale v. Coventry*, 1 B. C. C. 240. So also lands descended, *Galton v. Hancock*, 2 Atk. 424. See a MSS. Report of the Judgment on the Rehearing, 2 Cruise Dig. 170.

The personal estate may be exonerated by express directions, or by necessary implication from the whole context of the will, but not by circumstances *dehors* the will. See *Fereyes v. Robinson*, Bunb. 301; *D. of Ancaster v. Mayer*, 1 B. C. C. 454; *Brummell v. Protheroe*, 3 Ves. 113; *Bootle v. Blundell*, 1 Mer. 216; *Watson v. Brickwood*, 9 Ves. 453; but notwithstanding such exoneration, an estate descended will be applicable to the discharge of a mortgage upon an estate devised expressly subject to incumbrances. *Barnewell v. Lord Cawdor*, 3 Mad. 453. But if any part of a testator's real estate is devised in trust for payment of debts, that part of the real

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estate must be applied to the discharge of the incumbrance before the estate descended. And see *Donne v. Lewis*, 2 B. C. C. 257; *Manning v. Spooner*, 3 Ves. 114; 3 Atk. 556; *Davis v. Topp*, 1 B. C. C. 524. These doctrines and principles do not apply where the devisor did not contract or has not adopted the debt. The question whether a person in the character of heir or devisee, or as a purchaser, or in the case of a surety, has adopted or made the debt his own, depends upon circumstances. On this point, see *Scott v. Becher*, 5 Mad. 96; *Tweddell v. Tweddell*, 2 B. C. C. 101; *Butler v. Butler*, 5 Ves. 534; *Ancaster v. Meyer*, 1 B. C. C. 454; *Waring v. Ward*, 5 Ves. 670, 7 Ves. 332; *Parsons v. Freeman*, Amb. 115; *Belvidere v. Rochfort*, 5 B. P. C. 299; *Cope v. Cope*, 2 Salk. 449; *Woods v. Huntingford*, 3 Ves. 128; *The Earl of Oxford v. Lord Rodney*, 14 Ves. 417, and Coote on Mortg. vol. ii. p. 491, *et seq.*

The intention to charge the real estate, whether by trust for sale, or limiting a term or simple charge, will not exonerate the personal estate, unless the further intention to that effect is expressed or to be inferred from the will according to settled rules of construction. See *Aldridge v. Lord Walkcourt*, 1 Ba. & Be. 312; *Tower v. Lord Rous*, 18 Ves. 132, where most of the authorities on this point are collected. The direction to pay a particular debt out of a portion of the real estate affords an inference in favour of the exoneration of the personal estate. See *Hancox v. Abbey*, 11 Ves. 186; *Walker v. Pink*, cited 1 Cox. 5. The circumstances to be collected from the context of the will as indicating this intention are infinite and undefinable. The cases which have been decided on the subject are not quite consistent. They are to be found in *Gray v. Minnethorpe*, 3 Ves. 103; and more amply in *Booth v. Blundell*, 1 Mer. 192, 1 Eden's Rep. 47, note. See also 1 Mad. Chanc. 588, 2 Coote Mortg. 462, *et seq.*

The rule is applicable only as between the real and personal representatives, and not other parties, as creditors, legatees, &c., in favour of whom the assets are marshalled by a Court of Equity. See *O'Neale v. Mead*, 1 P. W. 693; *Davis v. Gardner*, 2 P. W. 190; *Rider v. Wager*, Id. 335; *Bartholomew v. May*, 1 Atk. 487; *Tipping v. Tipping*, 1 P. W. 730.

IRELAND.

(COURT OF EXCHEQUER.)

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v.
HARRIS.

THE COMMISSIONERS OF CHARITABLE
DONATIONS and BEQUESTS, FRANCIS
DILLON and MATTHEW DILLON } *Appellants.*
THOMAS - - - - -

THOMAS HARRIS, ARTHUR WISE, } *Respondents.*
ABEL LABERTOUCHE, JAMES MONT-
GOMERY, and JOHN ROBINSON -

J. D. having two sons, one of whom, T. D., cohabited with a woman called Anne Robinson, in the year 1819 threatened to disinherit him unless he would break off the connexion; whereupon T. D. drew up and signed a paper in the words following: "I hereby solemnly declare, and with due awe
"and reverence appeal to the great Searcher of all hearts
"for the truth and sincerity of this declaration, that I am
"not married or in any manner contracted to the woman I
"have so long and so imprudently cohabited with, known
"heretofore by the name of Anne Robinson; and that from
"this moment to the end of my existence I will have no
"kind of communication with her, directly or indirectly;
"and I am satisfied to be no longer considered by my father
"as his son, and in the estimation of the world not to have
"any further claim to that title, than while I strictly adhere
"to this declaration in the fullest sense, and to the true
"spirit and meaning of it: and from the moment I deviate
"from it in any degree, may I be renounced by him and by
"all. And I hereby call on such trustees and executors as
"my father may appoint to carry into effect the final distribution of his property, to withhold from me all and every
"part of whatever bequest he may think proper to make in
"my favour, and not to consider me as the object he had
"in view, whenever I cease to support this solemn declaration. Given under my hand this 15th day of August,
"1819. (Signed) THOMAS ST. JOHN DILLON."

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Anne Robinson also signed a declaration in the words following, "I do hereby solemnly declare that I am not married or in any manner contracted to the above-named Thomas Dillon; and I do solemnly and sincerely promise that I will not from henceforth have any connexion, communication, intercourse, or correspondence whatever with him, directly or indirectly. Given under my hand this 15th day of August, 1819. (Signed) ANNE ROBINSON." The declarations were attested by a witness, who proved that they were placed in the hands of J. D.

J. D. by his will dated in November, 1819, devised and bequeathed all his property upon trust to invest the produce in the public funds or securities as therein mentioned, and out of the interest thereof, after paying a yearly allowance to his wife Catherine Dillon for her life, "upon trust to permit and suffer my elder son Thomas St. John Dillon to have, receive, and take out of the interest of such stock or securities that will remain after payment of said annuity to my said wife, one moiety of such interest to be paid to him by half-yearly payments whilst he strictly adheres to the solemn engagement he has entered into never to associate with or have any further knowledge of Anne Robinson, and which engagement, signed by him, I have put into the hands of my said trustees and executors, to be safely kept, so that it may be forthcoming when necessary: and as my said son Thomas has expressed his opinion to me at present, that, to prevent the possibility of the continuance or renewal of such a connexion, it is necessary for him to absent himself from this country for some length of time, and that he is determined to do so as soon as he conveniently can after my decease, this restriction is not to be considered in full force or to be acted upon until after his departure for such purpose, provided it be within three months after my decease; and I have allowed this latitude least she should, while he continued in Ireland, intrude herself on him, and by such or other acts cause a forfeiture of his claims under this my will: and should it fully appear that at any time after the said period he may happen to break through this engagement, then all benefit that it was intended he should derive under this will shall cease and be done away, and the property so bequeathed to him shall go as herein-after directed as in case of his dying unmarried and without

“lawful issue: and upon further trust to permit and suffer
 “my younger son James Dillon to have, receive, and take
 “the remaining moiety of the said interest on the said
 “stocks or securities, to be paid to him, or to his order
 “legally authorized to receive the same, by half-yearly pay-
 “ments: and on this further trust, to give, pay, or cause
 “to be paid to my said sons Thomas Saint John Dillon and
 “James Dillon, on their respective days of marriage,—such
 “marriage to be with the consent of my said trustees and of
 “my executors, or the majority of them,—the full amount
 “of the moiety to each of the monies so funded or secured;
 “and in case either of them marry without such consent, or
 “should die without having been married with such con-
 “sent, then the interest of the moiety to which the person
 “so marrying or dying was entitled under this my will to go
 “to the other or surviving brother during his life, and after his
 “death the principal sum to go to his lawful issue, if any, in
 “such manner, proportion, and under such restrictions, and
 “at such periods, as he by will or deed may direct or ap-
 “point; and in case both of my said sons should so die un-
 “married and without leaving lawful issue,” then he gave
 the interest of the estate for life to certain relations, and
 finally to certain charitable institutions. The will con-
 cludes in these words: “And I do hereby appoint my said
 “trustees and executors to be the sole judges of the future
 “conduct of my said sons; and they my said trustees and
 “executors, and they only, are to decide on what may
 “amount to a forfeiture of the benefits to be derived under
 “this my will.”

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In 1821 T. D. married Anne Robinson, having asked and obtained the consent of the trustees to a marriage with a person represented by him to be Mary Anne Madden. One of the trustees had given a general consent to the marriage, but the majority of the executors and trustees had consented specifically to a marriage with Mary Anne Madden, described as “only surviving daughter of Andrew Madden of Dunleary, Esquire,” and it was proved that Andrew Madden, who, upon the marriage, gave away Anne Robinson as his daughter, had a legitimate daughter whose name was Mary Anne Madden, and who was unmarried.

Half the funds were paid to T. D. by the trustees and executors upon the marriage.

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In 1822 T. D. filed a bill in the Court of Chancery in Ireland against the trustees and executors, and the devisees-over, stating the will, and that he had complied with the conditions, that he had not since his father's death had any acquaintance with Anne Robinson, and had married Mary Anne Madden with the consent of the trustees and executors; and praying that the trusts might be carried into execution.

On the 9th of December, 1824, T. D. died, leaving Anne Dillon (Robinson), with whom he had cohabited from the time of his marriage, and to whom, by the name of A. H. Robinson otherwise Dillon, he bequeathed all his property by will; but he left no issue.

On the 23d of December, 1824, Anne Dillon otherwise Robinson, as the representative of T. D., filed an original bill in the Court of Exchequer, Ireland, against the trustees and executors, containing nearly the same statements and prayer as the bill of T. D.

In their answer to this bill the trustees and executors stated, that they believed that T. D. had complied with the directions and conditions of his father's will, and that otherwise they would not have consented to his marriage.

James Dillon, the other son of the testator, died before his father, never having been married.

In the Court below a decree was made in favour of the plaintiff Anne Dillon otherwise Robinson, but this decree was reversed on appeal, and the following points were decided: 1. That the declaration of T. D. was not admissible in evidence as part of the will. 2. That "and" in this will could not be construed "or." 3. *Semb.* That the word "associate" in the will did not prohibit marriage. But, 4. That T. D. had not contracted a valid marriage, or at least not with such consent as was requisite, and that therefore the estates limited over, on his dying unmarried and without issue, vested in the devisees.

JAMES DILLON, of the city of Dublin, pawnbroker, was, at the time of his death, possessed of a personal property to the amount in value of 10,000*l.*

He had two children only, namely, Thomas St. John Dillon, his eldest son, and James Dillon, his youngest son; James Dillon the younger went to South America, where he died, shortly before the time of his father's death, unmarried, and without issue.

Thomas St. John Dillon having several years before his father's death cohabited with one Anne Robinson in a state of fornication, his father, in the year 1819, threatened that unless he would break off the connexion he would disinherit him; and thereupon Thomas St. John Dillon drew up in his own handwriting, and signed, a declaration in the words following: " I hereby solemnly
 " declare, and with due awe and reverence appeal
 " to the great Searcher of all hearts for the truth
 " and sincerity of this declaration, that I am not
 " married or in any manner contracted to the
 " woman I have so long and so imprudently co-
 " habited with, known heretofore by the name of
 " Anne Robinson; and that from this moment to
 " the end of my existence I will have no kind of
 " communication with her, directly or indirectly,
 " and I am satisfied to be no longer considered by
 " my father as his son, and in the estimation of
 " the world not to have any further claim to that
 " title than while I strictly adhere to this declara-
 " tion in the fullest sense, and to the true spirit
 " and meaning of it; and from the moment I
 " deviate from it in any degree, may I be renounced
 " by him and by all; and I hereby call on such
 " trustees and executors as my father may appoint
 " to carry into effect the final distribution of his
 " property, to withhold from me all and every
 " part of whatever bequest he may think proper

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“ to make in my favour, and not to consider me
“ as the object he had in view whenever I cease
“ to support this solemn declaration. Given under
“ my hand this 15th day of August 1819. (Signed)
“ THOMAS ST. JOHN DILLON.”

On the same occasion Thomas St. John Dillon drew up in his own handwriting, on the same paper, a second declaration, which was signed by Anne Robinson, as follows: “ I do hereby solemnly declare that I am not married or in any manner contracted to the above-named Thomas Dillon; and I do solemnly and sincerely promise that I will not from henceforth have any connexion, communication, intercourse, or correspondence whatever with him directly or indirectly. Given under my hand this 15th day of August 1819. (Signed) ANNE ROBINSON.”

“ Witness present at both signatures. (Signed)
“ Fras. Will. Hamilton.”

James Dillon by his will, bearing date the 13th day of November 1819, (the whole of it, except the signature, and the bequest of some small pecuniary legacies, being in the handwriting of Thomas St. John Dillon,) after appointing the Respondents Thomas Harris and Arthur Wise executors, devised and bequeathed all his property, after payment of his debts, legacies, and funeral expences, to the Respondents Abel Labertouche and James Montgomery, their executors and administrators, upon trust, to invest the amount or produce thereof in public funds or securities as therein mentioned, and out of the interest thereof, after paying a yearly allowance to his wife Catherine Dillon for her life, “ upon trust, to permit and suffer my elder son

“ Thomas Saint John Dillon to have, receive, and
 “ take out of the interest of such stock or securi-
 “ ties that will remain after payment of said an-
 “ nuity to my said wife, one moiety of such
 “ interest, to be paid to him by half-yearly pay-
 “ ments, whilst he strictly adheres to the solemn
 “ engagement he has entered into never to asso-
 “ ciate with or have any further knowledge of
 “ Anne Robinson, and which engagement, signed
 “ by him, I have put into the hands of my said trus-
 “ tees and executors, to be safely kept, so that it
 “ may be forthcoming when necessary; and as my
 “ said son Thomas has expressed his opinion to
 “ me at present that, to prevent the possibility of
 “ the continuance or renewal of such a connex-
 “ ion, it is necessary for him to absent himself
 “ from this country for some length of time, and
 “ that he is determined to do so as soon as he con-
 “ veniently can after my decease, this restriction
 “ is not to be considered in full force, or to be
 “ acted on, until after his departure for such pur-
 “ pose, provided it be within three months after
 “ my decease; and I have allowed this latitude,
 “ least she should, while he continued in Ireland,
 “ intrude herself on him, and by such or other
 “ acts cause a forfeiture of his claims under this
 “ my will: and should it fully appear that at any
 “ time after the said period he may happen to
 “ break through this engagement, then all benefit
 “ that it was intended he should derive under this
 “ will shall cease and be done away, and the pro-
 “ perty so bequeathed to him shall go *as herein-*
 “ *after directed, as in case of his dying unmarried*
 “ *and without lawful issue*; and upon further trust
 “ to permit and suffer my younger son James

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“ Dillon to have, receive, and take the remaining
 “ moiety of the said interest on the said stock or
 “ securities, to be paid to him, or to his order
 “ legally authorized to receive the same, by half-
 “ yearly payments; and on this further trust to
 “ give, pay, or cause to be paid to my said sons
 “ Thomas Saint John Dillon and James Dillon,
 “ on their respective days of marriage,—such
 “ marriage to be with the consent of my said
 “ trustees and of my executors, or the majority of
 “ them,—the full amount of the moiety to each of
 “ the monies so funded or secured; and in case
 “ either of them marry without such consent, or
 “ should die without having married with such con-
 “ sent, then the interest of the moiety to which the
 “ person so marrying or dying was entitled under
 “ this my will to go to the other or surviving bro-
 “ ther during his life, and after his death the prin-
 “ cipal sum to go to his lawful issue, if any, in such
 “ manner, proportion, and under such restrictions
 “ and at such periods, as he by will or deed may
 “ direct or appoint; and in case both of my said
 “ sons should so die unmarried and without leav-
 “ ing lawful issue, then my trustees herein-before
 “ mentioned, or the survivor of them, or the exe-
 “ cutors, administrators, or assigns of such survi-
 “ vor, to permit and suffer my friend and relation
 “ Francis Dillon, of the county of Carlow, Esquire,
 “ to receive and take the interest on the proper-
 “ ties hereby bequeathed to my said sons during
 “ his natural life; and after his decease to per-
 “ mit and suffer Matthew Dillon Thomas Esquire,
 “ son to my dear relation Elizabeth Dillon, other-
 “ wise Thomas, to receive and take the interest
 “ on the properties hereby bequeathed to my said

“ sons during his natural life ; and after his de-
“ cease my said trustees, or the survivor of them,
“ or the executors, administrators, or assigns of
“ such survivor, to hand over and pay such prin-
“ cipal sum to the governor and governesses of the
“ county of Carlow Infirmary, to be applied under
“ the control of the governors of Simpson’s Hos-
“ pital, part thereof in purchasing and fitting up
“ house sufficient for the reception of as many
“ infirm and reduced old men of the said county,
“ without regard to religious distinctions, as the
“ remaining part of the said fund will for ever
“ thereafter be enabled to support, to be called
“ and known by the name of “ The Dillon Insti-
“ tution.” And I hereby appoint my said trus-
“ tees and executors to be the sole judges of the
“ future conduct of my said sons ; and they my
“ said trustees and executors, and they only, are
“ to decide on what may amount to a forfeiture of
“ the benefits to be derived under this my will.”

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The testator, by a codicil to his will, left two small legacies of 5*l.* each, and died on the 8th day of December in the year 1819, without having revoked or altered his will or codicil, leaving Catherine Dillon his widow, who died before the commencement of the suit, and Thomas St. John Dillon, his only son, him surviving.

On the 10th of December, 1819, the will, codicil, and declarations were read in the hearing of the trustees and executors, and on the 8th day of February, 1820, the executors proved the will and codicil in the Court of Prerogative in Dublin.

The Respondent, Thomas Harris, principally acted as executor, and possessed himself of the greatest part of the testator’s personal estate and

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effects, consisting of ready money, government $3\frac{1}{2}$ per cent. stock, and other securities for money, assets, and effects, to the amount in value of 10,000*l.* or thereabouts, of which 1,384*l.* 12*s.* 4*d.* government $3\frac{1}{2}$ per cent. stock, and two several sums of 193*l.* 17*s.*, and 24*l.* 4*s.* 7*d.* in cash, the amount of interest received thereon, remained in the Bank of Ireland to the credit of the ~~cause~~ hereinafter mentioned of Robinson against Labertouche and others.

Thomas St. John Dillon, on the 26th of April, 1821, was married to Anne Robinson, under the name of Mary Anne Madden, he having first procured the written consent of the executors and trustees to his marriage with a person represented by him to be Mary Anne Madden. The licence also for his marriage was with a person named in the licence as Mary Anne Madden; and a certificate from the Reverend John Hunt certified that he had married Thomas St. John Dillon to Mary Anne Madden.

In July, 1822, Thomas St. John Dillon filed a bill in the Court of Chancery in Ireland against the trustees and executors, and Francis Dillon and Mathew Dillon Thomas, and the Attorney General, stating, among other things, the will of James Dillon (except the clause by which he was to lose all benefit under the will if he should have any further intercourse with Anne Robinson), and that he had complied with all the conditions imposed upon him by the will, and had not since his father's death had any acquaintance with her; and that he had married Mary Anne Madden, with the consent of the executors and trustees; and praying that the trusts of the will might be carried

into effect, and all necessary accounts taken, and that the balance of the trust fund might be applied for his benefit.

Thomas St. John Dillon and Anne Robinson otherwise Dillon cohabited together from the time of their marriage until the 9th of December 1824, when Thomas St. John Dillon died, leaving Anne Dillon, but not any issue by her, him surviving.

Thomas St. John Dillon before his death made his will, and thereby gave and bequeathed all property he should die possessed of to Anne Robinson, by the name of Anne Hemsworth Robinson otherwise Dillon, viz. ten bills of exchange, each for 100*l.*, then in the hands of Thomas M'Namara, and payable by Thomas Harris; and she afterwards obtained administration of the goods and chattels, rights and credits, of Thomas St. John Dillon, with his will annexed, out of the Court of Prerogative in Ireland; and in virtue thereof possessed herself of the ten bills of exchange in the will mentioned, and of all other the property and effects of Thomas St. John Dillon, which were in his possession at the time of his death.

On the 23d of December, 1824, Anne Dillon otherwise Robinson filed an original bill on the equity side of the Court of Exchequer in Ireland against the trustees and executors, the Appellants Francis Dillon, Matthew Dillon Thomas, and the Attorney General of Ireland, thereby stating, that Thomas St. John Dillon had complied with the directions and conditions in his father's will, and had married with the consent of the trustees and executors, and that in consequence of such marriage 3,500*l.* of the assets had been paid by

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the Respondent Thomas Harris to Thomas St. John Dillon in his lifetime ; the bill prayed that an account might be taken of all the personal property of the testator James Dillon, and of his debts and legacies ; and that all further and necessary accounts might be taken ; and that all the creditors and legatees of the said testator might be at liberty to go before the proper officer, and prove their demands, and be paid according to law ; and that the surplus or balance of the trust fund, if any, remaining in the hands of the trustees and executors, might, with the privity of the Accountant General, be brought into Court until the final hearing of the cause, to be applied and disposed of, as the Court should think just, amongst the persons entitled thereto, under the will of James Dillon and the will of Thomas St. John Dillon.

The executors in their answer stated, that they had believed that Thomas St. John Dillon had complied with the directions and conditions in his father's will, or that they would not have consented to his marriage ; and that he had therefore been paid 3,500*l.* out of the estate of his father for his moiety or share thereof. The trustees in their answer further stated, that they had given their consent to the marriage of Thomas St. John Dillon with one Mary Anne Madden.

The Appellants Francis Dillon and Matthew Dillon Thomas, by their several answers, insisted that Thomas St. John Dillon, by his marriage with Anne Robinson, without consent to a marriage with her, had by virtue of his father's will forfeited all claim to any part of his father's personal estate.

Anne Dillon otherwise Robinson died in the month of August, 1825, after the answers were filed, having made her will, bearing date the 25th day of July preceding, whereby she left and bequeathed to the Respondent John Robinson all the property which she was then or which she might thereafter be entitled to, and appointed the Respondent Thomas Harris executor of her will; the Respondent Thomas Harris proved the will, and also obtained administration of the unadministered goods, chattels, rights, and credits of Thomas St. John Dillon deceased.

John Robinson, then a minor, by Joseph Dunn his next friend, on the 2d of November, 1825, filed a supplemental bill in the Court of Exchequer against the several persons who were parties to the original bill, praying that the Respondent John Robinson might have the benefit of all proceedings had in the cause; and that the will of the testator James Dillon might be carried into execution; and that an account might be taken of the testator's personal estate; and that the rights thereto of Thomas St. John Dillon, Anne Dillon, and the Respondent John Robinson, might be ascertained; and that the Respondent John Robinson, as the residuary legatee of Anne Dillon, might be decreed entitled to the personal estate.

The several Defendants answered the bill; and the Respondent John Robinson, the Plaintiff in the cause, having replied thereto, and the Defendants having rejoined, the cause was at issue, and several witnesses were examined on the part of the Respondent John Robinson, and the Appellants Francis Dillon and Matthew Dillon Thomas,

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two of the Defendants in the cause ; but no witnesses were examined on the part of the other Defendants.

The Appellants the Commissioners of Charitable Donations and Bequests, on the 7th day of January, 1826, caused a bill to be filed in the Court of Exchequer, in the nature of a cross bill, against the Respondents Thomas Harris, Arthur Wise, Abel Labertouche, James Montgomery, the Appellants Francis Dillon and Matthew Dillon Thomas, and the Respondent John Robinson, one Thomas M'Namara (who was afterwards struck out of the bill), and the Attorney General of Ireland, praying, that the trusts of the will of the testator James Dillon might be carried into execution, under the order of the Court ; that the will might be decreed to be well proved ; that an account might be taken of the personal estate and effects of the testator James Dillon, into whose hands the same came, and how applied, and also an account of such parts of the personal estate, assets, and effects of the testator James Dillon, or the produce thereof, which were paid or handed over by the Respondent Thomas Harris, or any other the executors or trustees of the testator, to Thomas St. John Dillon and Anne Dillon otherwise Robinson, or either of them ; that the Respondents, Thomas Harris, Arthur Wise, Abel Labertouche, and James Montgomery, or such of them as ought to do so, might be obliged to make good the same to the assets of the testator James Dillon ; that accounts also might be taken of the personal estate of Thomas St. John Dillon and of Anne Dillon, and how applied and disposed of ; and that the Respondents, Thomas Harris,

Arthur Wise, Abel Labertouche, and James Montgomery, might be ordered to bring into Court, or to lodge in the Bank of Ireland, to the credit of the cause, all such monies and securities, assets and effects, as did belong to or form part of the personal estate of the testator James Dillon as they should confess to have in their or his hands or power, to be disposed of at the hearing of the cause as the Court should direct, according to the trusts of the will; that the Respondent Abel Labertouche might be ordered to transfer the sum of 1,500*l.* Government 3½ per cent. stock, then standing in his name in the transfer books of the Bank of Ireland, and which formed a part of the personal estate of the testator James Dillon, to the Accountant General of the Court, to be placed to the credit of the cause; that a receiver might be appointed; that the bill might be considered in the nature of a cross bill; and that the cause might be heard at the same time with the cause in which the Respondent John Robinson was plaintiff.

The several Defendants answered the bill; and the Respondents Thomas Harris and Arthur Wise, the executors, and the Respondents Abel Labertouche and James Montgomery, the trustees named in the will of the testator James Dillon, relied on the same matters as are set forth in their answers to the bill at the suit of Anne Dillon otherwise Robinson. The Appellants the Commissioners of Charitable Donations and Bequests having replied to the answers, and the Defendants having rejoined, the cause was at issue, and divers witnesses were examined on the part

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of the Appellants the Commissioners of Charitable Donations and Bequests, but no witnesses were examined on the part of the Defendants.

By an order made on the 9th of November, 1827, the Plaintiffs had liberty, upon the hearing of the second cause, to give in evidence attested copies of the pleadings and depositions in the first cause. Francis William Hamilton, to the 6th Interrogatory of the Defendant's Proofs, in the Cause of Robinson against Harris, deposed, that the person who signed the produced paper-writing marked with the letter B.* did cohabit and live with Thomas Saint John Dillon, the person who signed the paper-writing marked with the letter A.,† after the death of his father James Dillon, as this deponent verily believes: that Thomas Saint John Dillon and Anne Robinson lived and cohabited together as man and wife, in a clandestine manner, at the time of the death of James Dillon: that Anne Robinson, who signed the paper marked B., and who is named in the paper-writing marked A., and also in the complainant's bill Anne Dillon, is the same person.

To the 8th interrogatory the same witness deposed that he was very intimate with James Dillon and acquainted with Thomas Saint John Dillon his son: that Thomas Saint John Dillon cohabited and formed an improper connexion with a woman of the name of Anne Robinson, during his father's lifetime, and had formed the connexion for a considerable time prior to the

* The document signed by Anne Robinson, set forth, *ante*, p. 326.

† The document set forth, *ante*, p. 325.

death of his father, and the same existed at the time of his father's death; but that he did not think that James Dillon knew of such connexion at the time of his death, the same having been carried on clandestinely: that he often heard James Dillon express himself relative to the connexion formed by his son: that he said that if ever he could trace his having any intercourse whatever with Anne Robinson he would cut him off entirely, or to that effect; and the circumstance made him very unhappy in his mind, which he very often expressed to the deponent.

The same witness, to the 11th interrogatory, said, that Thomas Harris knew of the cohabitation of Thomas Saint John Dillon with Anne Robinson previous to the death of James Dillon, and was acquainted with Anne Robinson; and, as he believed, knew that Thomas Saint John Dillon cohabited with Anne Robinson after his father's death, and that Thomas Saint John Dillon and Anne Robinson lived together as man and wife after the death of James Dillon: that he had often met Thomas Harris in the company of Thomas Saint John Dillon after his father's death, and they were very intimate; and deponent believed that Thomas Harris was in the habit of visiting Thomas Saint John Dillon after the death of James Dillon, and whilst Anne Dillon was living and cohabiting with Thomas Saint John Dillon.

Other witnesses deposed to the same facts; and there was evidence that Thomas Saint John Dillon was married to Anne Robinson under the assumed name of Mary Anne Madden, the assent of the trustees and executors having been obtained to a marriage with a person of that name; but the exe-

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cutors jointly and severally by their answer denied that they had any knowledge of the party or the fraud ; and that if they had known or believed that the marriage for which their consent was asked was to have been with the person named or prohibited in the will, they would have refused to consent, although they were advised that, according to the wording of the will, they might legally have consented to such marriage.

The two causes came on to be heard on the 12th day of June in the year 1828 ; and by a decree made in the two causes it was ordered, adjudged, and decreed that the bill in the second cause, filed by the Appellants the Commissioners of Charitable Donations and Bequests, should be and the same was thereby dismissed, but without costs ; and that the bequests in the will of James Dillon the elder to the Appellants Francis Dillon and Mathew Dillon Thomas, and the ulterior limitations to the charitable uses, had not taken effect ; and that Thomas St. John Dillon deceased, in the pleadings mentioned, became absolutely entitled to the personal estate of the testator, and that the Respondent John Robinson was then entitled thereto by virtue of the wills of Thomas St. John Dillon and Anne Dillon otherwise Robinson ; and it was thereby referred to the Chief Remembrancer of the Court to take the usual accounts.

Against this decree the appeal to the House was presented.

The case came on to be heard on the 5th of April, 1830, when *Mr. Miller*, in the absence of *Mr. Knight*, on behalf of the Appellants, argued that

the condition in restraint of the marriage with Anne Robinson was not illegal, citing the Digest, 35.1.6., *Fry v. Porter*, 1 Ch. Ca. 138., *Harvey v. Aston*, 1 Atk.361., *Scott v. Tyler*, 2 B.C.C.437. Dick.716., and was proceeding with the series of authorities, when *Sir Edward Sugden*, who was to argue on behalf of the Respondents, intimated that he did not mean to dispute the doctrine that there might in a will or deed be a condition in restraint of marriage with an individual. But he asked what proof there was of a marriage with Anne Robinson? whereupon *Mr. Miller* proposed to read the evidence of Charles Madden; but it was objected, on behalf of the Respondents, that the evidence was not upon the table of the House; and thereupon it was ordered that the hearing of the appeal should be adjourned, to give the Appellants the opportunity of producing the evidence, they paying the costs of the day.

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The case came on again to be argued on the 2d of December, 1830.

For the Appellants.—*Mr. Knight* and *Mr. Miller*.

The consent to the marriage was obtained by false pretences. The first question is, whether Thomas Saint John Dillon contracted such a marriage as authorized the trustees to pay him the money? Putting fraud out of the question, and assuming that the trustees only are to decide, can it be a reasonable construction that such a marriage should give the moiety to Thomas Saint John Dillon, and should have deprived James Dillon of the right to it by survivorship if he had been living?

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The clause enabling the trustees to decide what should operate as a forfeiture applies only to minor circumstances of conduct. The testator did not mean to place in their hands the power to revoke or annul his will. This was not a marriage to which it was competent to the trustees to give consent. By a former clause of the will, the breach of the engagement on the part of Thomas St. John Dillon, not to associate with Anne Robinson, was made an express distinct ground of forfeiture and limitation over of the moiety given to him upon condition.

The Lord Chancellor.—The words giving the power to the trustees are very large. You argue that they must be controlled by the former clause, providing express forfeiture.

For the Appellants.—It cannot be supposed, consistently with the will, that he intended to give power to the trustees to consent to such a marriage, when even intercourse with the party was prohibited. It may be argued, that the forfeiture relates only to the interest of the sum bequeathed. But from the words providing, that in the case contemplated “all benefit he might derive under the will should cease,” and also from the provision, in a subsequent part of the will, that upon the death of the survivor “the principal sum should go to his lawful issue,” and from the whole context of the will, it is clear that the testator meant that the *corpus* of the estate should be the subject of forfeiture.

But suppose the trustees had by the will a power to give consent to such a marriage, have they ever given such consent? They say, that if they had known the truth they would not have given consent. A general consent, or a consent to a marriage with a woman of the name of Mary Anne

Madden, is not a valid consent. In this instance it was obtained by fraud; and it may be questioned whether it was a legal marriage, having been contracted in a false name for a fraudulent purpose. In the case of a minor marrying by her right surname and one of her right christian names, the other, by which she had been usually known, having been omitted, it was decided by Lord Stowell that the marriage was void.*

The limitation over, upon the event of both sons dying without issue, has taken effect upon the events which have happened, Thomas St. John Dillon was never legally married, or, if so, not with consent; and the death of James in the lifetime of his father does not alter the effect of the limitation.†

It might also, upon authority, be argued, that "unmarried *and* without issue" should be construed "unmarried *or* without issue." *Maberly v. Strode*‡, *Bell v. Phyn*.||

The Lord Chancellor.—The words are, not merely "should die unmarried," but should "*so* die unmarried," the antecedent being "without consent."

For the Appellants.—If the Appellants should fail on all other grounds of claim, they are at least entitled to the moiety given over upon the contingency as to James. The marriage of Thomas St. John Dillon could only entitle him to receive the capital of his own moiety, not that of James.

* *Pouget v. Tomkins*, 2 Hagg. Cons. Rep. 142.

† *Willing v. Baine*, 3 P. W. 113; *Humberstone v. Stanton*, 1 V. & B. 385.

‡ 3 Ves. 450.

|| 7 Ves. 458; and see *Weddell v. Mundy*, 6 Ves. 341; "or" construed "and." See also *Turner v. Moore*, Id. 560; and *Richardson v. Spraag*, 1 P. W. 433, and the note (2). *Keylway v. Keylway*, 2 P. W. 345. As to *Bell v. Phyn*, see the note (A.) at the end of the case.

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There was no power in the trustees to consent to give the moiety of James to John.

The declaration of Thomas Dillon might have been proved as a testamentary paper. The words of the will bound Thomas St. John Dillon “never to associate with Anne Robinson,” whose identity is proved.

The Lord Chancellor.—The declaration expressly refers to marriage.

For the Appellants.—As to the second reason for the Respondents, which rests upon the power given to the trustees, they are bound to act reasonably, and trusts receive a reasonable construction.* To entitle Thomas St. John Dillon to the capital of the fund, it was a condition precedent that he should be married, and to a person different from Anne Robinson.† *Lowe v. Ld. Huntingtower.*‡

For the Respondents.—*Sir Edward Sugden* and *Mr. Lynch.*

The evidence as to the cohabitation is inadmissible. It is sworn that no such declaration as stated in the will was delivered to the executors. The Defendants Harris and Wise, in their answer, say, “they never received from James Dillon (the testator), or any other person, any such instrument or declaration as in the will mentioned ;” and there is no other evidence. The allegation, therefore, of the testator’s will, is not proved ; and the declarations must not be considered as part of the case. As to the case of *Lowe v. Ld. Huntingtower*‡, it was the case of a complicated will, upon which it

* *Wrottesley v. Wrottesley*, 2 Atk. 584.

† *Lucas v. Evans*, 3 Atk. 260.

‡ 4 Russ. p. 532, note.

was difficult to put a construction. The testator contemplated the marriage of members of the family with other persons. Lord Eldon sent the case to a Court of Law, to ascertain whether evidence could be received of the age and circumstances of the members of the family. The Judges of the Court of King's Bench certified that such evidence could be received, but that if received it would not alter the opinion returned by the certificate. The Court must place itself in the situation of the testator, and consider the circumstances; but when so placed the circumstances do not alter the construction, but help the Court to a right construction. But in this case, how should a writing signed months before the will affect the construction of it? How could they be proved as testamentary papers? They could not be a part of the testamentary disposition.

The Lord Chancellor.—Your objection turns upon the want of identification. If it could be proved that the engagement produced was the same as that which is referred to by the will, I presume you would not object.

For the Respondents.—We do not mean to deny that the testator might have so referred to the paper as to make it make part of his will. Here is no proof of the declarations; and reference cannot be made to such paper to construe the will. The question as to the identity of the paper is not put in issue by the pleadings.

But before we enter upon the argument as to the admissibility of the evidence, it is necessary to consider what is prohibited by the testator. The declarations are dated months before the will, which must be construed as a waiver of the

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declarations. The declarations import a present engagement. By the will, the whole of the father's lifetime, and three months after his death, are allowed before the forfeiture is to accrue.

As to consent, there is not a word pointing to this marriage. The Judges below were of opinion that there was no prohibition of marriage, as appears by the notes on the back of the brief. It is not denied that a general consent to marry was given by the trustees, or specifically to marry Mary Anne Madden.

The Lord Chancellor.—The trustees in their answer say, they never received the declarations. How or from what place were they produced? An engagement is mentioned in the will, and reference is made to it; and although the testator says that he put it into the hands of his executors, which does not appear to be the fact, yet if such a document comes out of his repositories, it might be a question whether it is not sufficiently connected with the will to become evidence.

For the Respondents.—The evidence goes to cohabitation during the life of the father, which the will permitted. As to cohabitation after the death of the father, there is no witness who speaks to any before the marriage.

The question is, therefore, whether this is not a valid marriage. This question may be considered in two aspects: 1. That the marriage is not prohibited. 2. That the trustees had an unlimited power to consent.

The prohibition of marriage must have occurred to the testator if he had intended to prohibit it; but he looked only to illicit intercourse. The prohibition of marriage is odious in law, and

to be strictly construed. The testator might have wished to give the fund to the children of his son, although he should be rash enough to marry the person with whom he had cohabited. There is nothing expressed in the will as to prohibition of marriage, and the House cannot supply the prohibition, especially as the Judges in the Court below were of opinion that there was no prohibition. The Court of Appeal ought not to supply a contingency which the testator might and would have inserted if it had been intended.

As to the question now raised upon the validity of the marriage*, no such question is raised upon the pleadings; and not being put in issue, no evidence or argument upon the question can be admitted. The question was not raised in the Court below.

Supposing the marriage to be prohibited, the identity of the wife is not shown. In a passage of the answer read on behalf of the Appellants it is said, that "it might be Mary Anne Robinson."

If the identity is proved, Mary Anne Robinson might have been the natural daughter of Andrew Madden. The hand-writing of the father is proved by the children, and she might have gone by one name as well as the other. If so, the question is decided.

The Respondents Harris and Wise, in their answer to the bill of Robinson, referring to former answers, say as evidence of the friendship of their conduct, that all the trustees and executors, in their answer to the bill of Thomas St. John Dillon, swore that he fulfilled all the conditions of his father's will.

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* See *Sullivan v. Sullivan*, 2 Hagg. Cons. Rep. 238.

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The Lord Chancellor.—They say it is untrue that they were acquainted with Anne Robinson, or with the fact that it was the intention of Dillon, when he procured their signature to the consent, to marry Mary Anne Robinson. Does not this passage rather exclude the supposition and the argument?

For the Respondents.—When consent has been given all power is ended; it cannot be retracted.

The Lord Chancellor.—Where is the evidence of consent?

For the Respondents.—One of the trustees gives a general consent, the other gives a consent to marry Mary Anne Madden. Suppose the issue of the marriage were to claim under the will, would they be cut off and bastardized? Upon questions of consent to a marriage, formality is not regarded in a Court of Equity; and a consent once given cannot be retracted.

There is a gift over in case of marriage without consent, but the trustees only are to decide what is a forfeiture. The limitation over, and the power of the trustees, apply equally to both sons, and must receive the same construction.

It is argued for the Appellant, that this is a power confined to details; but the will expressly gives an unlimited power, and a new will cannot be made by counsel for the testator. He makes the trustees sole judges as to the conduct of his son, and they only are to decide what shall be a forfeiture.

All the authorities upon the subject in Courts of Equity prove, that where a power is given to trustees, except in the case of fraud, as in the case

of Lord Sandwich*, who under a power made an appointment to a son in a consumption, the Court cannot interfere to limit the extent of the power. In *French v. Davidson*†, a testator having directed and empowered executors to pay an annuity, unless circumstances made it unnecessary, inexpedient, and impracticable, it was held that this power could not be controlled. The Vice Chancellor, in delivering judgment in that case, according to the report, says, it must be intended, “unless circumstances, *in their opinion*, should render it unnecessary, inexpedient, and impracticable.” The words which in that case were implied are expressed in this case; for the question of forfeiture is referred exclusively to the judgment of the trustees.

In a case not reported where a gift‡ to a natural son by the terms of the will depended upon a declaration to be made by trustees as to his conduct, the present Master of the Rolls decided that the Crown took the property; that it could not be given to the son, the trustees having expressed no opinion; that they were appointed by the will to exercise their judgment, and not having done so, the son could not take the property. In this case the trustees have executed their power. The consent has been given, the parties are dead, and it can never now be revoked.

The Lord Chancellor.—The argument as to consent must rest upon the evidence in the cause. As to general consent, there is nothing to be observed; but as to the consent of the trustee to

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* Not reported. See 11 Ves. 479.

† 3 Madd. 396.

‡ See the Note (B.) at the end of the case.

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the marriage with Mary Anne Madden, he agrees to the marriage on the faith of the statement made to him. In the answer they say, that if they had known that Mary Anne Madden was Mary Anne Robinson they would not have given the consent. The appellants will admit, that if once given it could not be revoked; but they must argue that, in substance, it was never given at all. The question is, whether it was in fact and in law a consent? The trustees consent to a marriage with A., and the party is married to B. If a power is given to consent to a marriage with a particular individual, it must be carried into effect with the knowledge of the party who has the power.*

For the Respondents.—I have submitted a probable hypothesis that she might be the natural daughter of Madden.

It is argued that general words cannot control a specific intent, which may be admitted, but the trustees are to be judges of what is a forfeiture.

Upon the words of the will it is argued:
1. That there is a gift over of the capital. 2. That the words of contingency, “unmarried and without issue,” mean “unmarried or without issue.” It is further argued, that the share of James is distinct. A moiety of the interest of the fund is by the will given to Thomas St. John Dillon, so long as he adheres to the engagement mentioned in the will. The limitation over is on breach of the engagement, in which case all benefit which it was intended he should derive under the will should cease, and the property be-

* See *Clarke v. Parker*, 19 Ves. 1.

queathed to him should go as therein-after directed in case of his dying unmarried *and* without issue.

But if Thomas Saint John Dillon should marry with the consent of the trustees, half the capital of the fund was to be paid to him upon such marriage; and the half was accordingly paid to him upon his marriage. If either of the sons should marry without consent, or die not having married with consent, then the interest of a moiety was to go to the other or surviving brother during his life, and at his death the principal to go to his issue. If James had married without consent his moiety would have gone to Thomas.

It was intended by the testator that no limitation over should take effect until all the issue of both sons were extinct.

But upon the argument now urged the House is desired to put such a construction upon the will as might, in some events, cut out both the sons and the issue of both. It is impossible to put on the clause the sense which is contended for. The word "so" is immaterial, and probably was not contained in the original will. The question is, whether, in the passage by which the moiety is limited over the word, "and" can be read "or," to defeat a limitation. Supposing that it could be so read, what is to be done with the word "both," in the subsequent passage of the will, by which the fund is limited over upon the contingency if "both the sons" should die unmarried "*and* without leaving issue? The word "and" cannot be read "or" without making a will for the testator, and destroying his own will.

The cases of *Maberley v. Strode*, and *Bell v. Phyn*, are not applicable; and if so, the authority

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of those cases is questionable. It was rejected in *Doe v. Rawdin*.^{*} In *Doe v. Cooke*†, where there was one contingency, with several branches, viz., “dying an infant, unmarried, and without issue,” it was held that all must happen to vest the limitation over. In the case of *Doe v. Rawdin* there was, first, an absolute gift to M. W., then a defeasance upon the contingency “if she should die unmarried and without issue.” It‡ contended in argument, that “and” must be read “or.” The Chief Justice was much struck with the case of *Framlingham v. Brand*§, (which is not noticed in the Report), as making against the cases decided by the Master of the Rolls. It was also argued, in *Doe v. Rawdin*, that if “and” were not read “or” the word “unmarried” would be surplusage, as he could not have lawful issue without marriage.

The Lord Chancellor.—In *Fairfield v. Morgan* the word “or” was read “and.”

For the Respondents.—There are fifty cases in which it has been so held to prevent the property going over.

If the word “or” had been used in this will, it must have been read “and,” to provide for issue. This is established by the authority of *Fairfield v. Morgan*.

As for the argument, that at all events the Appellants are entitled to take the share of James, they must shew that the particular event has happened on the contingency of which the limitation over to them depends, otherwise they cannot take, although the fund is not given to any body

* 2 B. & A. 441.

§ 3 Atk. 390.

† 7 East, 269.

‡ Sir E. Sugden.

|| 2 N. R. 38.

else. If, upon the events, it is not disposed by the will, the Respondent would take as next of kin.

Mr. Lynch.—The event on which the gift over depends has not happened. One term of the provision, the being “unmarried,” must be rejected to vest the limitation.

In *Doe v. Rawdin* Lord Tenterden said “no word should be rejected unless it was repugnant.

James died unmarried; but as Thomas was married, and the moiety of James was not devised over, the brother being dead, unmarried, and without issue, there is nothing to take it from Thomas during his life.

The Lord Chancellor.—The words are, “Then all benefit that it was intended he should derive under this will shall cease, and the property so bequeathed to him shall go as herein-after directed as in case of his dying unmarried and without lawful issue.”

Mr. Lynch.—That is upon the question of forfeiture, to which I will advert presently. When the testator contemplates a gift over to strangers, he alters the phrase. In *Maberley v. Strode*, if the case is not overruled, the word “and” was construed “or,” to carry into effect the general intent of the testator. In this case the intention cannot be effected if the word is changed. In *Maberley v. Strode* the testator refers to issue, not to marriage. He also gave a power of jointuring; upon which provision the judgment proceeded, because it showed an intent of the testator to confine the estate of the son to a life estate.

Bell v. Phyn was decided on the authority of *Maberley v. Strode*. The point there arose inci-

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dentally. It was not the question at issue. The Appellants must contend for the construction, that the latter words mean leaving issue living at the death, which is contrary to the decision in *Bell v. Phyn*.

The case of *Doe v. Jessep** is more adverse to this construction. Lord Ellenborough in that case says, the construction must be according to the common sense, unless some inconvenience would ensue. What inconvenience will ensue in this case if the word "and" is construed according to its right meaning? If the testator had intended to restrain marriage he would have expressed the intention in his will. Restraint of marriage is odious in law, and conditions of such a nature are strictly construed. The word "so" cannot have the effect; because, from the connexion of the words in the sentence, it would apply to the issue as well as to the parents. The testator could not mean to cut off the issue. If it could be implied that the word "so" refers to consent, it would operate as a condition subsequent, and held only to be *in terrorem*. But illicit intercourse, and not marriage, with Anne Robinson, is the event prohibited.

The declaration, not being identified as the paper mentioned in the will, is not admissible in evidence.

The Lord Chancellor.—There is evidence that the declaration was in the hand-writing of Thomas St. John Dillon. From whose custody it came there is no proof, which is a defect in the evidence; but there are circumstances proved which

* 12 East, 289.

might contribute to removing the objection to the admissibility of the evidence.

Francis Hamilton, a witness, says, that “the declaration was written upon the occasion of James Dillon’s settling his affairs and disposing of his property ; that the causes, &c. were, that James Dillon declared his intention of cutting off his son altogether if he did not give up the connexion with Anne Robinson ; that he the deponent attended as the friend of James Dillon, to see the declaration signed, and afterwards handed the paper to James Dillon.

This traces the paper to the hands of the testator, and raises a fair presumption that it is the paper mentioned in the will ; since it is in proof that it was once in his custody. Still it is open to observation, that the party might have written or signed two declarations. There is no proof, certainly, from what possession the paper comes.

Mr. Lynch.—The deposition of Francis Hamilton was made in the cause of *Robinson v. Harris*, and cannot be read, because the declarations were not put in issue in that cause. They are put in issue in the cause of *Harris v. Robinson*, but in that cause there is no such evidence.

The Lord Chancellor.—The result of the objection is, that the paper is not identified. But it is argued that, as against parties claiming under the will, in which the substance of the declaration is incorporated, it must be evidence.

Mr. Lynch.—That is another view of the question. But we contend that the depositions of Hamilton cannot be read, because they are not put in issue in the cause in which they were made. The order, directing that the depositions in the original

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should be read in the cross suit, is made saving all just exceptions, and this is a just exception. The practice on this point is settled, *Clark v. Turton*.^{*} But supposing the evidence of Hamilton to be admissible, the trustees in their answer say, they do not believe that the instrument is in the handwriting of Thomas St. John Dillon, and the evidence was not brought forward in the lifetime of Thomas St. John Dillon, although he had filed a bill claiming under the will. There is no evidence of forfeiture by cohabitation.

The Lord Chancellor.—Although there is no evidence from what custody the declarations are produced, there is evidence that they were once in the custody of the testator. It is argued that marriage is not prohibited, much less that a forfeiture is declared. Can you, Sir E. Sugden, refer to any case where the words in any instrument being large enough to comprehend and prohibit marriage, as the word “association” in this case, it has been held that it would not apply to marriage?

Sir E. Sugden.—There is no case directly in point. But the prohibition must, on principle, and by a reasonable construction, be applied to the case apparently in the contemplation of the testator.

Mr. Knight in reply.—The objection to the admissibility of the evidence is untenable. Where there is an original and a cross cause, it is to save the useless repetition of the evidence that the order is obtained to read in the second the depositions in the first cause, and it is of necessity admitted in both causes. The question here relates to a fact

* 11 Ves. 240.

referred to in the will. The answer of the trustees will not prove or disprove the fact, unless it is read by the plaintiff. It might have laid a ground for inquiry; but the Court below has decided the case. This displaces all argument upon the answer, as matter of evidence, except the part which was read, wherein the trustees say, that "they would not have consented to the marriage if they had known the fact that the person called Mary Anne Madden was Mary Anne Robinson."

The word "so" refers to consent, and therefore it is immaterial to consider whether "and" means "or;" but that it does so appears by the case decided by Lord Alvanley and Sir William Grant. The infancy of the devisee makes the distinction.

In *Doe v. Cooke* the devisee died an infant, on which the case was decided, *Doe v. Cooke* confirms the cases decided by Lord Alvanley and Sir William Grant.*

In *Doe v. Rawdin* the party had not attained his majority. The Judges held, that although a minor, yet, having married, the event had not happened on which the estate was devised over. The Judges in that case wished to avoid inserting a conjunctive in one part of the clause, and a disjunctive in the other. They do not profess to overrule the cases decided by Lord Alvanley and Sir W. Grant. The principle of the rule is to prevent the issue being disinherited.

The Lord Chancellor.—The argument does not apply to the case, if the word "so" refers to consent to marriage only, and does not control both alternatives. The son might then die, having married without consent, and yet leaving issue. In that case I feel

* *Maberley v. Strode* and *Bell v. Phyn*.

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pressed by the argument for the Respondents, that the testator might well intend to punish the transgression of the son, and yet not mean to cut off the grandchildren.

Mr. Knight.—I have argued on the supposition that the word “so” has not the effect of reference and prohibition; but if it has that effect, the antecedent words have the largest application. It is a singular supposition that the testator should intend to prohibit concubinage with a certain woman, but not marriage. The will speaks of “a solemn engagement, signed by the son, never to associate with or have any further knowledge of Anne Robinson.” A paper is produced corresponding with this statement.

The Lord Chancellor.—There being no account from what place it comes, can you make use of it?

Mr. Knight.—That may be the rule as to old documents; but in the case of modern instruments, and in this case especially, the handwriting being proved, it is not necessary to show from what custody the document is produced.

The Lord Chancellor.—It is a question of identification, and you do nothing unless you show that it is the document to which reference is made in the will. There may have been twenty such papers. The only evidence is the production of a paper, which may be the document. The trustees say that they received no such paper from the testator as he asserts in the will. Does it answer that part of the description in the will, “An engagement which I have put into the hands of my trustees?” Suppose another paper produced, importing that the son acknowledged his error in

cohabiting with Anne Robinson, and promising to make reparation by marrying her.

Mr. Knight.—At all events there would be a right to an inquiry what the paper was. Here is a paper referred to in a will by two descriptions. A paper is produced which answers one of the descriptions: no paper is produced on the other side. If the burden is thrown on the Appellant to show that there is no other paper, he must prove a negative.

Independently of the paper, if the prohibition in the will is large enough, there is no need of aid from the paper.

If marriage without consent is prohibited by the will, the question is, whether he has married with consent. Now the consent obtained was to marry a person with whom he did not marry.

It is argued that the evidence to show that there was no marriage with consent is not admissible, because the matter is not in issue. But the cross bill is filed for the administration of the trusts of the will. It is sufficient to show the state of things existing which gave the title. The trustees say there was no consent; the question of marriage is therefore in issue.

As to the share of James, whether the word "so" refers to the consent or to the events, as he died unmarried and without lawful issue, his share remains unaffected, and goes over. At all events the case ought not to be decided without inquiry.

At the conclusion of the argument the following observations were made by

The Lord Chancellor.—This is a case of difficulty in many respects, both as it regards the

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points to be decided, and the facts and evidence upon which the decision must proceed. In such a case the House ought not to hasten to a judgment without due consideration. But on some of the questions raised in the discussion no doubt can be entertained, and those may at once be disposed of. I will now proceed to state the points which it is for the House to decide.

As to the declaration or engagement of Thomas St. John Dillon, it is true that the question from what custody it is produced does not, generally speaking, apply to a document of this description, because it is a written document of modern date, attested by witnesses, and the handwriting proved; but in the observations which I made during the argument I referred to the question of identity. Unless it is the engagement to which the words of the will refer,—to which the testator by his will refers, importing the document into and making it parcel of his will, it is immaterial whether there is an attestation to it or not. The question of custody becomes material to be considered, because the testator, having alluded to the contents of the declaration or engagement, proceeds to state that he has placed it in the hands of his trustees and executors, with the specific object that it might be forthcoming when necessary, and enable the trustees to judge whether or not his son had committed a breach of the engagement. The trustees deny that the paper, or any such document, was placed in their hands by the testator; the proof therefore fails. It is argued that the document is identified by the signature of Thomas St. John Dillon. But the rule of evidence on this subject is clear. If there is in a will a latent ambiguity, it

it may be explained by parole evidence, or by extrinsic documents. When it is unambiguous, although reference is made to another instrument, nothing can be imported by way of reference into the will from that or any other extrinsic document, unless it is clear and indisputable that the proposed document in all respects satisfies the description of the will, and that it can be none other than the very document intended by the testator.

In this case there is indeed proof that the paper, at the time when it was written and signed, was in the possession of the testator; but that it was in his possession at the date of the will there is no proof: the statement of the will makes it probable that it was not so; but having no better proof than that by possibility it might be the document mentioned in the will, it cannot be received in evidence as part of the will.

Another question arises upon the construction and effect of that very material clause of the will by which the fund is limited over "in case both the sons of the testator should die unmarried *and* without leaving lawful issue." That the word "and" may in certain cases be construed disjunctively cannot be questioned: but for what purpose? not to defeat the object of the will by a forced construction, but by a probable construction to supply a defect, and support the apparent intent. In such cases "and" may be construed "or," and *vice versa*.

Much stress has been laid upon the authorities of *Maberley v. Strode* and *Bell v. Phyn*. But in *Maberley v. Strode* there was a third clause which almost imposed on the Court a necessity of changing the word to give a reasonable construction.

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The limitation over was in case the son of the testator should die unmarried *and* without, *or, having issue, they should all die* before attaining the age of twenty-one years, or marriage. It was to accomplish the general intent of the testator, which was apparent in this case from the superadded provision of the will, that the word “and” was construed disjunctively.

As to *Bell v. Phyn*, Sir W. Grant, referring to the case of *Maberley v. Strode*, does not take notice of the circumstance to which I have adverted, of the superadded clause, in that case; and he held that the word “and” must be construed “or,” probably upon the ground that the case, upon the general intention of the testator, to be collected from the provisions of the will, required such change to give a reasonable construction.

But the doctrine is not to be applied to a case where the intent of the testator would be frustrated, not advanced, by such a change.

Long since the decision of these cases others have occurred, as *Doe v. Cooke*, and *Doe v. Rardin*, in which it has been held that the word “and” must be construed according to its usual import, unless some general intent, appearing by the provisions of the will, requires a different construction.

There is also the case of *Fairfield v. Morgan*, in which the judges, by the mouth of Sir James Mansfield, gave an unanimous opinion, that to justify the change of the conjunctive particle into the disjunctive the intent and purpose of the will must be considered.

Upon the whole, on these two topics, which

have occupied a very considerable portion of the very able arguments, I entertain so little doubt that had there been nothing more in this case I should not have troubled your Lordships with a suggestion of the necessity for further consideration. But there are two points, on which entertaining some doubt, I should wish to have an opportunity of a little further examination. I am desirous, on one point, of looking a little further into the facts of this case, and on another, of looking a little further into the authorities. The first is, whether or not what was done really may be said to amount to the consent of the trustees. I am a good deal impressed by the circumstances under which that consent appears to have been given, and I wish to be able to make up my mind whether a consent actually was given. If it was once given, I entirely agree that it was irrevocable, and that no statement of the trustees excusing themselves afterwards could be listened to ; but then it must appear that they gave the consent, if consent of theirs is necessary, otherwise a marriage under that sanction, be it what it may, cannot be said to come within the provision. Upon this fact, therefore, I should wish for an opportunity of looking further into the papers. The matter of law on which I shall desire further opportunity of looking into cases is that which I put during the latter part of the argument to the very learned Counsel who conduct the Respondent's case. The words are here very large : they regard a prohibition of all knowledge of or association with a certain individual. The question then is, whether a marriage with that individual is validly prohibited by those general

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words. That such prohibitions are to be taken strictly I agree; but that they are to be taken so strictly as to exclude the plainest intendment which common sense can make or can affix to the words of the instrument is a proposition which undoubtedly I am not prepared to admit, and which I do not understand to have been stated at the bar. In order that marriage may be taken to be prohibited, it must be clear that the testator intended to prohibit marriage, whether he used the word marriage or not. That I hold to be clear. I go further, and say, though it may be probable, that had his attention been directed specifically to that which now appears to be an omission, he might have added words which would have imported a prohibition of marriage, still, if he has not done so, your Lordships following the judgment of the Court below upon this point, may take it as though the marriage with Anne Robinson was not prohibited. What therefore I wish to do is simply to see whether or not I can find authority, or analogy in the authorities, for holding that on such words as we have here, without a more express prohibition, enough exists to effect the apparent intention of the testator to forbid the match. For the purpose of looking into these two matters, my humble proposition is, with your Lordships leave, that the further consideration of this case shall be adjourned until Saturday next. I have stated my opinion at a greater length than I should otherwise have done, following the rule I laid down for myself when proposing to move the affirmance of a judgment—not to give reasons at length. I have gone somewhat into the case upon this occasion, though in all probability that will

be the course I shall feel it right to pursue; and if on further consideration I should feel it my duty to suggest to your Lordships the propriety of affirming the decision in the Court below, I shall most probably have no need further to trouble your Lordships: what I have said now will dispense with that. But I have thought it fit to throw out these suggestions while the learned Counsel are at the bar, for this purpose, that the Court naturally wishes to have the assistance of those ministers of justice who practise before it, by obtaining any suggestion from them between this time and next Saturday, if the points I have thrown out for their consideration should render it in their judgment expedient to add any thing more.

The Lord Chancellor.—This is the case of an appeal brought from the Court of Exchequer in Ireland from a decree pronounced by that Court upon a case of great importance. It is one upon which at a former time I entertained considerable doubt. In the course of the hearing I addressed your Lordships at some length upon a point upon which I entertained no doubt, in which it appeared to me that an erroneous view had been taken of the law by the learned Judges from whose decision this appeal was brought. A declaration had been admitted of a person, a stranger as it were to the will, except that he was the object of the testator's bounty, but who was no party to the making of the will; and this declaration in writing, and the declaration of another person of the name of Mary Anne Robinson, had been imported into the cause, and taken

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into consideration by the Court in construing the will in question. The ground upon which that importation was made appears to have been, that the testator says in the will, "If my son Thomas Saint John Dillon shall break the solemn engagement in writing which he entered into, and which I have given over to the possession and custody of the trustees, to be forthcoming when required, then he shall be disinherited, that is to say, he shall be prevented taking any benefit under my will." Those who argued for the admission of the declaration considered it as if it were to be taken to be a portion of the will. I stated the grounds on which I clearly held it could not be taken as a portion of the will. They were shortly these—that there was a want of identification; that there was no evidence whatever to show that the engagement actually produced, written and signed by the parties stated, was the engagement to which the testator referred in his will, and rather, that there was evidence the other way, because the executors and trustees, to whom he said he had given that engagement to be kept by them denied, in their answer upon their oaths, that they ever had received it, or had ever received any paper whatever. Though I entertained upon this subject no manner of doubt, I ought to state, in deference to the opinion of the learned Judges who appear to have considered this as evidence, that I have consulted a learned person, the Chief Justice of one of the Courts of Westminster Hall, who, without knowing my opinion, gave a very clear and decided opinion, that, under the circumstances, it was not evidence.

I also throw out of view entirely another point which was argued at great length on both sides at the bar, upon the material devise in question: "And in case both my said sons should so die unmarried and without having lawful issue, then my trustees herein-before mentioned, or the survivor of them, or the executors, administrators, or assigns of such survivor, to permit and suffer my friend and relation, Francis Dillon of the County of Carlow, Esquire, to receive and take the interest on the properties hereby bequeathed to my said sons." It is said that in this case the word "and" should be read "or;" and that is contended on the authority of two cases, *Maberly v. Strode* and *Bell v. Phyn*; the one determined by Lord Alvanley and the other by Sir William Grant, and which are connected together, inasmuch as in *Bell v. Phyn* a reference was made to *Maberly v. Strode*. Reliance being placed upon those two cases, when you come to look into them they do not bear out the proposition of reading "and" in the disjunctive as "or," where it will tend to frustrate and not to further the general intent, which would be the effect here. In that case there was a third clause in the devise which showed that the testator contemplated the having issue, and the decease of that issue under age; it is manifest, also, that *Bell v. Phyn* rested upon that case. Then the third case, of *Fairfield v. Morgan*, a case at common law, had been determined by the opinion of all the Judges in Ireland; for there was a writ of error from the Court of Common Pleas to the Court of King's Bench in Ireland, and then an appeal to this house. In that case you have the opinion of all the Judges

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in Westminster Hall, that instead of "and" being read "or," "or" may be read "and," for the purpose of coupling the two conditions together, joining them and taking them as one, for the purpose of carrying into effect the clear intention of the testator. On the ground I have stated, and on other grounds, I am clearly of opinion that in this case your Lordships must read "and" conjunctively, so that both these events must occur in order to let in the remainder over.

Then there remains a third question, which I shall shortly dispose of, before I come to that which is the real ground of the judgment which I recommend to your Lordships upon this appeal. There is a solemn injunction in the will, that the son shall not associate with or have any knowledge of Anne Robinson; and he is to forfeit all benefit under the will if he shall have any knowledge of or shall associate with Anne Robinson, a person who is admitted to have been his kept mistress, though it is denied, and justly denied, that there is a tittle of evidence in the cause to show that she was a common prostitute. Then say the Respondents, though there is a forfeiture conditioned on his continuing to associate with or have knowledge of Anne Robinson, *non constat* that the testator meant to prohibit him from marrying her; that he might have conscientious scruples; and to that argument I pay a good deal of respect, for it is in consistency with the doctrine as to a condition or devise over in restraint of marriage. It is very possible that the testator may have meant to say, "My scruples are conscientious; "you ought not to live in concubinage either with

“ Anne Robinson or anybody else, but I do not debar you from marrying Anne Robinson.” If that is not within the condition, there is an end to the question. It is contended, on the side of the Respondents, that he married Anne Robinson; and that the forfeiture is only in case of his associating with Anne Robinson. That, however, is not the ground on which I intend to proceed in advising your Lordships.

I now come to the material words: “ And in case both of my said sons should so die unmarried and without leaving lawful issue,” then over to the present Appellants and the Commissioners for Charitable Uses, a person of the name of Francis Dillon, and Matthew Dillon Thomas. Holding that both events must occur, let us see what the conditions are upon which that forfeiture or limitation in remainder over is effected by these singular clauses. What must happen in order to let in the remainder over? I agree explicitly in the argument used at the bar, that being here upon the claim of the remainder-man, the proof is upon those claiming under that remainder over; that the burden is upon them to prove the forfeiture; that it is not a fit or at all an accurate view of the case to call upon the devisee, Thomas St. John Dillon, either in his capacity of original devisee, or as succeeding on the default, by the predecease of all issue of his brother James Dillon; or, if both are to be put in the same capacity, that it is not for the next of kin to come in and to prove the marriage to have been with the consent of the trustees and executors, so as to escape the forfeiture in the first part of the

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will. I am of opinion that that is not to be required, but that the remainder man must show that he is entitled to have his remainder let in under the last part of the will. In default of this proof, it is quite clear that the decree must stand. The only question, therefore, is, whether, taking the material part of this will, sifted of the husk, and throwing that aside, you are of opinion that that has happened upon which the remainder is let in. The words are these: "And in case both of my said sons should so die unmarried and without leaving lawful issue." Then follow words covering the whole of the clause immediately preceding, as well as the first part of the will, operating upon the whole, and taken as a test by which the latter part as well as the first was to be judged; and in a will, according to established rules, the whole is to be construed together. The words are: "I hereby appoint my said trustees and executors to be the sole judges of the future conduct of my said sons; and they my said trustees and executors, and they only, are to decide on what may amount to a forfeiture of the benefits to be derived under this my will." Now your Lordships will perceive, as connected with this passage, "and in case both my said sons should so die unmarried and without leaving lawful issue," this very material provision, "such marriage to be with the consent of my said trustees and of my executors or the majority of them; and in case either of them marry without such consent, or should die without having married with such consent, then the interest of the moiety to which the person so marrying or dying was entitled

“ under this my will to go to the other or surviving brother during his life, and after his death the principal sum to go to his lawful issue, if any, in such manner, proportion, and under such restriction, and at such periods, as he by will or deed may direct or appoint; and in case both my said sons should so die unmarried and without leaving lawful issue,” &c. This is a material part of the case. I called the attention of the learned counsel, in the course of their argument, to the word *so*, which is in my mind a most material word. The pressure of it was felt by the counsel against whose clients it operated; and they have urged no ground, in my judgment, upon which I can advise your Lordships to reject that word *so* as immaterial, because it clearly connects that part of the devise with the previous part, “ marrying with the consent of the trustees or executors, or the majority of them.” It makes no sense without that clause. A man cannot die in more ways than one. “ In case he die without leaving lawful issue ” I should have been inclined to construe, “ in case he shall marry and die without leaving lawful issue, or in case he shall die unmarried and leaving no lawful issue.” If the word *so* was not there, I should still have said, that in soundness of construction, taking this in connection with that which precedes it, and coupling it with what follows, as to the discretion of the trustees and executors, it must mean married in that way alone in which the whole instrument contemplates the possibility of their marrying, at least to the extent of taking any benefit by the will, but taking the words in connection with the word *so*, it must be marriage with the consent pre-

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scribed by that word of reference. There is no doubt whatever that the word connects it clearly and plainly, and leaves nothing to interpretation and inference, and shows that they must not only have married, but that they must have married in the way pointed out. The construction of these words then being plain, and the conviction upon my mind is so strongly in favor of this construction of these words, that I cannot advise your Lordships to adopt any other, the only question that remains is as to the fact: did the party marry with that lawful consent?

Now as the remainder-man must show his title to exclude the devisee or next of kin, it is for him to prove that he did not marry with that consent. I go the full length of that proposition. It was for the purpose of enabling me to inquire more minutely into the facts of this case, by examining the whole of the papers, that I expressed a wish to postpone the judgment. I have since with great anxiety looked into the papers, and the result undoubtedly is, that I cannot state, upon reading the whole of this evidence, that this individual married with the consent of the trustees or executors, or the majority of them; but I will go a step further, and state, that if it may not be said that he married against their consent, yet he married in circumstances almost amounting to marrying against their consent; he clearly married under the influence of fraud and misrepresentation, and every species of deception which could be practised both upon the trustees and upon others. I have a great doubt of the validity of the marriage, as it is here stated on the facts; but that is not an issue raised by the

pleadings; and indeed it is barely possible that the marriage may be valid, because it is barely possible that Anne Robinson had been, as was suggested at the bar, the natural daughter of Andrew Madden. If she was not the natural daughter of Andrew Madden, the marriage is void, because he was married to Mary Anne Madden, the daughter of Andrew Madden, in the church of Bray, and that man is proved by his handwriting to be the attesting witness to this marriage. He was therefore a party to the fraud. If she was not his daughter, *cadit questio*, then he was never married at all, with or without consent. But the question is not, was he married? but, was he, or not, married with the consent of the executors and trustees, or the majority of them? Now I say he certainly was not. Here is the evidence upon that subject. In the Appendix of the Respondent's Case, Abel Labertouche says, "I cannot further delay giving my concurrence to your marriage." That is all he says. James Montgomery says, "I have no objection to your intermarriage with Miss Mary Anne Madden, only surviving daughter of Andrew Madden Esquire, of Dunleary." Was she the only surviving daughter? It is possible that the individual known as Anne Robinson may have been the daughter of Andrew Madden, under a concealed name; but it is very uncommon that a man should give his natural daughter the same name as his legitimate daughter; and there is a Mary Anne Madden comes forward. Charles Madden also comes forward, and says, "I have only one sister, Mary Anne Madden; but she is still unmarried, a spinster, at the moment I am speaking." Undoubtedly Anne Robinson

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may, unknown to his legitimate children, be his daughter; but it is unlikely that he should give to two daughters the same name. He, most probably, if the illegitimate child was born first, would not have called his legitimate child by the same name by which he had called his illegitimate child; but if she was born in adultery, after his marriage, and after the birth of his legitimate daughter, he never would have given her the name of Mary Anne; he would have given her his surname, perhaps, but not have given her the same Christian name. I therefore get over many difficulties when I suppose that she was the daughter or indeed any connexion of Andrew Madden; but at all events she is not the only surviving daughter; and it is as the only surviving daughter that Mr. James Montgomery gives his consent, and he did not know what he consented to if he consented to his marrying a person of another name. Now I will put the supposition, that these men meant to give, the one a general, and the other a particular consent only, mistaking the description of her. It is said, it signifies not, he gave his consent. But this is not sufficient; we must have a majority of four, or the whole falls to the ground; and this letter from Mr. Arthur Wise is put in: "Dear Sir—I am happy to have it in my power to give you my sanction to your marriage with Miss Mary Anne Madden, daughter of Mr. Andrew Madden of Dunleary, County of Dublin." Another, Thomas Harris, says, "Dear Sir—I also agree to your marriage, as stated above." There is evidence given in the cause, by two different persons, that Thomas Harris knew Anne Robinson; then if he did he could not have known that she

was Mary Anne Madden, because he afterwards distinctly swears, and so do both of them in their answer distinctly swear, that a gross fraud and imposition was practised upon them both, and that had they known that Mary Anne Madden was Anne Robinson they never would have given their consent.

Can I in this place take upon me to advise your Lordships to say, that it can be pretended for an instant that this is a consent to the marriage? It is a consent to his marrying—a consent to his marrying somebody; a consent to his marrying Mary Anne Madden, daughter of Andrew Madden. They state that they had no more idea that she was Anne Robinson than that she was a person that they never heard the name of; they never dreamt or suspected that she was Anne Robinson, or the giving their consent was the last thing they would have done; that on looking to this will they see such an indisposition towards Anne Robinson, that, though they had been advised by Counsel that under their very general discretionary power they might have consented to his marrying Anne Robinson, yet they never should have consented if they had known she was Anne Robinson. Here therefore was a gross fraud committed. Here was no consent obtained, for that which was obtained by fraud was not obtained at all. I am clearly of opinion, then, that it would be an insult upon justice and common sense to hold this a marriage with the consent of those trustees.

Such being the view which I take of the case, I beg to guard myself by one word against misconstruction. I do not say that if the trustees

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had given a consent to this marriage with Anne Robinson, any thing they did afterwards, either by inference or by express words, could have revoked that consent. They were *functi officio*. The marriage was effected, and issue might have been procreated ; a revocation, therefore, was out of the question. But this was a fallacy in the argument of the learned Counsel, who pressed us with that view of the subject. I say it is not proved that the trustees ever gave their consent, and afterwards withdrew it. The fact is, that they never gave a consent at all ; a fraud was practised upon them ; they did not know with whom they were consenting to his intermarrying, and therefore the question of consent given and withdrawn does not arise. Do not let it be supposed that I consider that the trustees or executors, not knowing the situation in which those persons were placing themselves till afterwards, could have said, “ if we had known such and such things we should “ not have given our consent, because such and “ such reasons have occurred to us since ; as, for “ instance, hearing that the testator did not like “ this young woman.” But what they say as to what they would or would not have done is a proof that they were deceived ; and I use it only in this way, as shewing an opinion in which they both concur, that they would not have consented if the facts had been truly represented to them. All arises upon the face of the will itself ; the facts are not such as afterwards came to their knowledge ; they saw upon the face of the will the desire of the testator, and his plan, and were bound as far as they could to execute the will fairly, and in execution of that trust, they state that it never was their inten-

tion to act otherwise. For these reasons I propose that the decree appealed from be reversed, and that the case should be remitted to the Court below, finding that the limitations over to Dillon and Thomas, and the ulterior bequests to charitable uses, have taken effect; and that Thomas Saint John Dillon did not become entitled to the personal fortune; and that John Robinson, one of the Respondents, was not entitled thereto, by virtue of the wills of Thomas and John Dillon and Anne Dillon. By the decree, "it was referred to the Chief Remembrancer of the Court, or his deputy, to take an account of the personal estate;" and certainly the account must be taken in the Master's Office exactly in the manner pointed out by the latter part of the decree. The reversal of the decree, therefore, ought not to extend to the account; for whichever way your Lordships decide, the account must be taken, and the payment of debts and legacies provided for.

I am reminded that I have omitted one question in my statement, and it is a material consideration undoubtedly. The testator appoints his trustees and executors to be the sole judges of the future conduct of his sons, and the trustees and executors, and they only, are to decide on what may amount to a forfeiture of the benefits to be derived under the will. Now it is suggested, is not the discretion what shall amount to a forfeiture given to the trustees? I think they had a very large discretion vested in them; but then the question is, have they sanctioned that which was done, so as to relieve from the forfeiture? They consented, acting under the fraud which was practised upon

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them, and not knowing that the son was about to marry Anne Robinson. If they had known the fact, I think they might have sanctioned the marriage; but they did not allow him to marry Anne Robinson. It was the opinion of the lawyers, that notwithstanding the generality of the first part of the will, they might have permitted a marriage with this individual; though I ought to say, upon the very high judicial authority of the noble and learned Lord with whom I have conferred, that he doubts whether the marriage is not struck at absolutely by the words which prohibit associating with Anne Robinson. But supposing that the Irish lawyers well advised these parties that they had the power, they did not exercise it; they did not allow the son to marry Anne Robinson; and I do not think they have any right to give condonation after the marriage. They have not given him the property. If that had been the case it would have raised a more difficult question. If, with their eyes open, they had decided to consent, knowing the sort of marriage he was contracting, I should have been of opinion that the consent was sufficient. But they have not done so; they are the mere victims of misrepresentation; and there are circumstances which raise in this case a doubt in my mind whether there is not a more serious offence committed by the falsification of the register. For the reasons I have given, I shall now move your Lordships that this judgment be reversed to the extent which I have stated.

Judgment reversed.

Ordered and adjudged, that the decree complained of in appeal be, and same is hereby reversed; and it is declared, that the ulterior limitations to the charitable uses in the decree mentioned had taken effect; and that Thomas St. John Dillon deceased did not become absolutely entitled to the *said personal fortune*; and that the Respondent John Robinson is not entitled thereto by virtue of the wills of Thomas St. John Dillon and Anne Dillon otherwise Robinson. And it is further ordered, that the cause be remitted back to the Court of Exchequer, to do therein as shall be just, and consistent with this judgment, without prejudice to such claim as the executors may be advised to make to an allowance in their accounts of any monies paid over by them to Thomas St. John Dillon in respect of the said property.

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(A.) It may be doubted whether *Bell v. Phyn* ought to be considered as a case in which "and" is construed "or." The testator in that case, after having given to his children an absolute estate in the residue of his personalty, provides, that "in case of the death of any of his children without being married and having children, the share of such child so dying shall survive to the others." According to the structure of this conditional limitation, both events must concur to defeat the preceding estate and vest the limitation over.

If a child should die without having been married, and without having had children, the estate of that child would be divested. If the child either married or had children the contingency becomes absolute.

The marginal note in *B. v. P.* says "and" is construed "or;" and what is said by Grant, M. R., may seem at first sight to warrant that abstract.

But what that learned Judge says is, that "dying unmarried and without children" is in effect only one contingency, unless "and" is read "or." The substance of the decision in *B. v. P.* turns upon the construction of the word unmarried, upon which the authority of *Maberley v. Strode* is followed, that it means never having been married. The other point was upon the construction of the words "dying without having children," which in that case was held to mean without having had children, and that the estate vested upon the birth of a child.

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In effect the case of *Bell v. Pryn* did not call for the expression of any opinion upon the question, whether "and" should be construed disjunctively? The facts excluded the question; for the party to whom the first estate was given was married and had children; both contingencies had happened. The observation of the Judge, that the contingency of issue comprehended the contingency of marriage, and therefore, to give a meaning to the contingency of marriage distinct from having children, it was necessary to construe "and" disjunctively, was an extrajudicial observation.

The reference made by him to *Maberley v. Strode* was upon the construction of the words "dying unmarried," in the same manner as he referred to *Pinbury v. Elkin*, 1 P. W. 563, for the construction of the words "dying without having children;" and these were the only two points decided by the judgment.

(B.) *Read v. Wedderburn* and others. This case arose upon a suit in Chancery, commenced in the year 1809, and the question turned upon the will of Colonel Alexander Read, (who had no legitimate issue,) by which he made a certain provision for the education and outfit of his son (a natural child) as a merchant. The will then contained the following declaration and bequest:—"His education as a merchant, and stipulated time of servitude, being completed, I shall consider him as sufficiently qualified then to make his own way through the world without any patrimony or pecuniary aid: that shall nevertheless be held out to him, under the circumstances which I shall here mention. Having hitherto acted in such a manner as to leave doubts with me regarding his future conduct in life, I have resolved that his receiving any further assistance from me shall depend upon the character he may acquire after he becomes independent; and pursuant to this determination, I request, that if he reside in England his guardians there will endeavour to procure every possible information respecting it during the first seven years of his independence, at the end of which he will be twenty-six years of age; and that should it be such as they shall think would merit my entire approbation, they will award him the sum of 10,000*l.* sterling, to be paid him upon his setting up in business, or entering into partnership with

“any established house, provided that his plan be approved of by them. In case he should settle in India, his guardians there will in like manner inform themselves particularly as to his character, and transmit their information to those in England, who will decide accordingly upon the point in question as already directed.”

In a suit instituted by the son, claiming this sum, and a supplemental suit by his assignees, upon his insolvency, against the executors of the will and the Crown, an inquiry was directed as to what the executors had done or were desirous of doing in exercise of the discretion reposed in them by the testator in respect to the 10,000*l*. Upon this matter of inquiry the Master reported

“That Sir D. Wedderburn, the surviving executor, declined saying that he thought the conduct of the plaintiff William A. Read was, up to the period of his attaining twenty-six years of age, such as would have merited the entire approbation of the testator, and that Sir D. Wedderburn, by his state of facts, submitted that the executors of the testator had not exercised any discretion respecting the legacy of 10,000*l*; but he stated, that if the power was still with him as executor, he was willing that the plaintiff W. A. Read should have the benefit of the legacy or sum of 10,000*l*, provided the Court was of opinion that he could consent thereto with safety, regard being had to the terms of the will.”

In another branch of the cause it was reported that the testator was illegitimate.

Upon these reports the Vice-Chancellor (Sir J. Leach) held that the 10,000*l*. passed to the Crown as part of the residuary personal estate.

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(COURT OF CHANCERY.)

ROBERT HAIG Esq. - - - *Appellant.*

SIR WILLIAM JACKSON HOMAN Bart.,	} <i>Respondents.</i>
HENRY ARABIN, MARIA FAVIERE	
Widow, LOUISA HOWSE Widow,	
THOMAS PARSONS POE and GER-	
TRUDE his Wife, and ANTHONY	
L'ESTRANGE - - -	

If a leasehold interest is assigned by way of mortgage, the assignee, unless there is a special provision to the contrary, takes the interest, subject to all the covenants and obligations of the original lessee.

B. N. having an interest in lands, which he held, subject to head-rents, under the see of Kilmore, for terms of years, renewable periodically on the payment of fines, granted under-leases at certain annual rents, and subject to fines for renewal; and he covenanted with the sub-lessees to renew the under-leases as often as he should obtain renewals from the see of Kilmore, the sub-lessees paying all head-rents and renewal fines.

The interest in these under-leases vested in R., who assigned and conveyed to a trustee his interest in the terms, together with other lands, to secure the payment of annuities which he had granted to F. The trust as to the leases was first to pay the rents and fines, and then the annuities.

The interest of B. N. in the leaseholds was mortgaged and sold under a decree of foreclosure, and finally assigned to H. in August, 1814. In September, 1814, the interest of R. in the under-leases was assigned to H., as purchaser, under a commission of bankrupt.

In 1815, the annuitants filed a bill, praying a sale of the lands charged with the annuities, and payment, subject only to the head-rents; and afterwards, upon discovery that the leases had expired, a supplemental bill was filed against H. praying that they might be renewed upon reasonable terms. Upon a reference under the decree, the Master having

found that the rents and fines paid by H. and the lessees under the see for renewals, were a charge upon the lands prior to the annuities, his report was in this respect overruled by the Court, upon exceptions; and upon a second report, the Court below held, that the annuities were a charge prior to the fines. But this decree was reversed upon appeal.

In such a case the covenant does not run with the land, but is personal, and the right under the lease to deduct the rent and fines is not merged by the union of the principal and under-leases in the same person.

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BEFORE the year 1791, the lands of Upper and Lower Carnans, parcel of an estate called Maybolg, together with the lands of Killan, in the county of Cavan, were demised by the Bishop of Kilmore to Broughal Newburgh for a term of twenty-one years. The lease was renewed from time to time to Broughal Newburgh and his representatives by the bishops of the see for the time being, who received fines for the renewals.

In the year 1791 Broughal Newburgh executed an underlease of the lands of Maybolg to Charles Stewart, for a term of twenty-one years, subject to a yearly rent of 115*l.* 5*s.* Irish currency, and certain renewal fines payable to Newburgh and his assigns; and Newburgh thereby covenanted to renew the lease to Stewart and his assigns as often as he himself should renew with the Bishop of Kilmore, upon payment of all rent, and of the renewal fine therein mentioned, including a fine of 57*l.* 12*s.* 6*d.* Irish currency payable every five years during the demise.

Charles Stewart's interest in the lands under the lease afterwards became vested in Patrick Smith; and Broughal Newburgh, in the year

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1791, entered into an agreement, by letter or article, to demise the lands of Killan, containing about one hundred and thirty acres, to Patrick Smith, at a rent of 26*l.* annually, of like currency, and subject to renewal fines; and Newburgh thereby agreed to renew the lease as often as he himself should renew with the Bishop of Kilmore, upon payment of all rent and of the renewal fines, including a fine of 13*l.* to be paid to Newburgh and his assigns at the end of every five years during the demise; and it was thereby agreed that for every 50*l.* which Newburgh, his executors, administrators, or assigns, should be obliged to increase and advance in the rent or fine payable by him or them to the Bishop of Kilmore or his successors, for the renewal of his head lease of the lands, Patrick Smith, his executors, administrators, and assigns, should advance the sum of 1*s.* in the pound for all such rent as was thereby agreed to be paid by them for the premises. The respective terms in the lands demised by the two leases or articles expired at Michaelmas in the year 1811.

The interest of Patrick Smith in the lands of Upper and Lower Carnans, and in the lands of Killan, became, upon Patrick Smith's death, vested in James Rawson, who married one of his daughters and co-heiresses; and he being also seised in right of his wife, under a deed of partition made between the trustees and co-heiresses of Patrick Smith, of freehold interests in other lands called Monaghanuse and Tullynaska, situate in the county of Cavan, &c., subject to the several head rents and fines for renewal payable in respect thereof, in the year 1809 granted two annuities, one of 300*l.* per annum and the other of 200*l.* to

Maximilian Faviere, for the lives of two of his daughters ; and, as a security for the payment thereof, Rawson granted and conveyed his interest in the lands of Upper and Lower Carnans and of Killan, and also in the lands of Monaghanuse and Tullynaska, and other premises, to Edward Shannon, as a trustee for the annuitant, upon trust, in the first place, out of the rents, issues, and profits thereof, to pay the head rent and renewal fines payable thereout under the lease and article respectively, and subject thereto to pay the annuities to Maximilian Faviere for the lives of his daughters respectively.

The interest of Broughal Newburgh, under his lease of the lands of Carnans and Killan under the see of Kilmore, was conveyed by him in mortgage to one James Corry, in security of a large debt, and was in the year 1812 sold under a decree of the Court of Chancery in Ireland, in a cause then depending for the foreclosure of the mortgage, and was purchased by Cornelius Gautier, who in the year 1813 obtained a renewal of the lessee's interest in the lands from the then Bishop of Kilmore, upon paying all arrears of rent and renewal fines due in respect thereof from the expiry of the former lease in 1811 to the date of renewal, which amounted to upwards of 1,900*l*. Gautier afterwards sold and conveyed his interest under the renewed lease to the Appellant, by deed bearing date the 7th August, 1814. The Appellant, in 1816, renewed the lease in his own name, and paid to the Bishop all rent and renewal fines due in respect thereof up to the time of his obtaining such renewal, to the amount of 320*l*. ; whereby the Appellant became immediate tenant of the lands

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and premises under the see of Kilmore, and assignee of Broughal Newburgh's interest therein.

A commission of bankruptcy having issued against James Rawson in the year 1810, his interest in the sub-lease of the lands of Carnans and Killan was set up for public sale, along with other lands held in fee by his assignees, and was purchased by the Appellant, and conveyed to him by the assignees, by deed bearing date the 7th September, 1814; on which occasion it was provided by the terms of sale, that "The purchaser was not to be precluded by his purchase from con- testing the validity, if he shall think fit, of any of the annuities or incumbrances affecting the lands, save the mortgage for 1,500*l.* to Messrs. Briscoe and Dickson; and a good legal title was to be made to the purchaser."

This mortgage for 1,500*l.* the Appellant paid off on the 7th of September, 1814; and having thus become the purchaser, both of the interest of Broughal Newburgh as lessee, and of James Rawson as sub-lessee, of the lands and premises, united, to a certain extent, the character of landlord and tenant of the demised premises in his own person.

The Respondents, Sir William Jackson Homan, Henry Arabin, Maria Faviere widow, Louisa Howse widow, Thomas Parsons Poe and Gertrude his wife, claiming to be entitled to the annuities of 300*l.* and 200*l.*, on the 15th of May, 1815, filed a bill in the Court of Chancery in Ireland against the Appellant and several other Defendants, among other things charging, that by an indenture bearing date the 22d of June, 1809, and made between James Rawson and Rebecca his wife of the first part, Maximilian Faviere of

the city of Dublin of the second part, and Edward Shannon, one of the Defendants to the bill, of the third part, it was among other things recited, that by a certain deed of partition dated 10th May, 1809, and made between the parties therein named, certain lands therein set forth were conveyed to the several trustees therein named, to or to the use of James Rawson, his executors, administrators, and assigns, or upon such uses and trusts as should be declared respecting the same by any deed or deeds executed by James Rawson and Rebecca his wife.

The bill also charged it to be further recited, by the indenture of the 22d June 1809, that James Rawson having agreed, for the considerations therein mentioned, to sell to Maximilian Faviere one annuity or yearly rent-charge of 300*l.* a year for the natural life of Louisa Howse, Maximilian's eldest daughter, and another annuity or yearly rent-charge of 200*l.* a year for the natural life of Gertrude Poe, Maximilian's second daughter; and James Rawson having agreed to convey and assign to Edward Shannon all and every the lands and premises of which he was seised and possessed under the deed of partition; and James Rawson and Rebecca his wife having agreed to appoint to the use of Edward Shannon all the lands and premises contained in the deed over which they or either of them had any power of appointment by virtue of the deed; James Rawson, by the indenture of the 22d June, 1809, for the considerations therein mentioned, granted, bargained, and sold unto Maximilian Faviere, his heirs and assigns, for the life of his two daughters, the two annuities of 300*l.* and 200*l.*; and James Rawson and Rebecca his wife thereby conveyed the lands and premises

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in the indenture mentioned, according to the right and interest which they respectively had therein, to Edward Shannon, as a trustee, for securing the payment of the two annuities, and for the other purposes in the indenture specially set forth.

The bill then alleged, that the indenture of 22d June, 1809, was duly registered; that James Rawson and Rebecca his wife had full power to execute the same, and that it was duly executed by them and the other parties thereto; that the annuities were in arrear; and that the Plaintiffs who claimed the same were justly entitled thereto. The prayer was, "That Robert Haig might set out what title deeds, tenants' leases, or counter-parts of tenants' leases, he had in his possession or power; and that the two annuities of 300*l.* and 200*l.* might be deemed and decreed to be charged upon the several lands and premises comprised in the indenture of the 22d of June, 1809; that an account might be taken of what was due to the Plaintiffs, Sir William Jackson Homan, Henry Arabin, Maria Faviere, and George Williamson, on foot of the annuities of 300*l.* and 200*l.*; that the trusts of the deed of the 22d of June, 1809, might be carried into execution by the decree of the Court; and that the two annuities, and all arrears thereof, and all growing gales thereof, might be levied out of the rents, issues, and profits of the lands and tenements comprised in the indenture of the 22d of June, 1809, or might be raised by demise, sale, or mortgage thereof, or of a competent part thereof; that all necessary parties might join in the deeds necessary for that purpose; that a receiver might be appointed to

“ receive the rents, issues, and profits of all the
 “ several lands, tenements, and premises in the
 “ indenture of the 22d of June, 1809, mentioned ;
 “ and that the same might be paid and applied,
 “ when received, in payment of the head rents
 “ payable thereout respectively, and afterwards
 “ in payment and discharge of the two several
 “ annuities of 300*l.* and 200*l.* ; and that the De-
 “ fendants, or such of them as should acknowledge
 “ or confess to have in their possession or power
 “ the title deeds of the said lands and premises, or
 “ any of them, and also the tenants’ leases or
 “ counterparts of tenants’ leases of the lands and
 “ premises, or any part thereof, might be ordered
 “ to bring in and deposit the same in the Bank of
 “ Ireland, to the credit of the cause.”

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The Appellant was absent from the kingdom about the time when the bill was filed ; and having neglected to enter an appearance, or put in an answer, the Respondents, on the 1st of February, 1816, obtained a conditional decree of sequestration against the Appellant, which was afterwards, on the 18th of November, 1816, made absolute. By that decree “ it was referred to Stewart King Esquire, one of the Masters of the Court, to take
 “ an account of what was due to the Plaintiffs,
 “ Sir William Jackson Homan, Henry Arabin,
 “ Maria Faviere, and George Williamson, on foot
 “ of the two several annuities of 300*l.* and 200*l.* ;
 “ and also to take an account of all charges and
 “ incumbrances affecting the lands and premises
 “ prior to the deed of annuity.”

On the 24th of July, 1817, the Master made his report in the cause, setting forth, “ That there
 “ was due to the Plaintiffs, Sir William Homan,

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“ Henry Arabin, George Williamson, and Maria Faviere, on foot of the two several annuities of 300*l.* and 200*l.*, a sum of 1,250*l.* sterling; and that he did not find that there was any charge or incumbrance affecting the lands and premises prior to the date of the deed of annuity, no claim having been made before him.”

This report was afterwards confirmed; and no exception having been taken thereto, on the 26th of January, 1818, the cause came on to be heard; and it was ordered and decreed, “ that the sum of 1,250*l.* reported due to the Plaintiffs, Sir William Jackson Homan, Henry Arabin, George Williamson, and Maria Faviere, together with the Plaintiffs’ costs in the cause, should be decreed a charge on the lands and premises in the pleadings mentioned: And it was further ordered, that the Defendant Robert Haig should, within six calendar months, to be computed from the date of the decree, pay to the Plaintiff Maria Faviere the sum of 1,250*l.* reported due, together with the Plaintiffs’ costs of the suit, and thereupon the Plaintiffs should discharge the lands therefrom; and that in default of the Defendant Robert Haig paying the sum of 1,250*l.*, and the costs, within the time, the Master should set up and sell to the best bidder the trust-term in the lands in the pleadings mentioned, or a competent part thereof, subject to the payment of the future and accruing gales of the annuities of 300*l.* and 200*l.* in the pleadings and decree mentioned,” &c.

The Respondents having, subsequently to the date of this decree, discovered that the term in

the original leases of Upper and Lower Carnans and Killan had expired, the same having never been renewed by J. Rawson, they, on the 15th of April, 1823, filed a supplemental bill in the cause, in the nature of an original bill, against the Appellants and other parties; which supplemental bill, among other things, set forth, "that they had since the obtaining of the decree discovered that several persons claim to be entitled to several charges and incumbrances upon and affecting the lands and premises mentioned in the indenture of the 22d June, 1809, and to several estates and interests therein, under and by virtue of divers deeds and conveyances executed by James Rawson and Rebecca his wife after the date of the execution of the indenture of the 22d of June, 1809, although the Plaintiffs submitted that their rights could not be at all prejudiced or impaired by such deeds or conveyances."

The Plaintiffs further charged in the supplemental bill, "that the lands of Carnan and Killan and Maybolg, mentioned in the indenture of the 22d of June, 1809, were part of the estate of the see of Kilmore, and were, together with other parts of the lands of Carnan, Killan, and Maybolg, at the time of the execution of the indenture of the 22d of June, 1809, held by William Perrott Newburgh, or by some of his representatives, under a lease thereof from the Bishop of Kilmore; and that the lands of Upper and Lower Carnan, being part of Maybolg, had been theretofore demised by William Perrott Newburgh, or by some person under whom he claimed, or by some of his representatives, to Patrick Smith, the father of Rebecca Rawson,

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“ or to some person under whom he claimed;
“ and that, upon his decease, the lands and the
“ interest in the lease became vested in his five
“ daughters and their respective husbands, and
“ were partitioned and divided by the indenture
“ of the 10th of May 1809; and upon this parti-
“ tion James Rawson became entitled to a share
“ or proportion of the lands, subject to a propor-
“ tion of the rents and fines reserved by the lease
“ thereof; and in which lease or leases made by
“ William Perrott Newburgh, or the persons under
“ whom he claimed, or by his representatives,
“ are contained covenants, that when and so often
“ as the therein named lessees should renew the
“ lease or leases under which they held the lands
“ from the Bishop of Kilmore, that the lessors
“ should grant new leases thereof to the therein-
“ named lessees, or to their representatives; and
“ setting forth, that Robert Haig the elder
“ purchased that part of the lands of Carnan,
“ Killan, and Maybolg so allotted to James
“ Rawson, and held by lease under the repre-
“ sentatives of William Perrott Newburgh, from
“ the assignees of James Rawson, who was a
“ bankrupt, for the then unexpired term in the
“ lease, but subject to the charges and incum-
“ brances affecting the same, and amongst others
“ to the two annuities of 300*l.* and 200*l.* granted
“ to Robert Haig the elder after he purchased
“ the lands, renewed the lease, and obtained a
“ new lease thereof from the representatives of
“ William Perrott Newburgh, or from Joseph
“ Dickson; and also that he paid to the repre-
“ sentatives of William Perrott Newburgh, or to
“ some other persons, the rent and quinquennial
“ and other fines reserved and made payable in

“ and by the lease under which the lands were
 “ held ; and setting forth, that the last renewal or
 “ new lease of the lands obtained by Robert Haig
 “ the elder, from the representatives of William
 “ Perrott Newburgh, or from Joseph Dickson,
 “ was obtained by him in the year 1812 or in
 “ the year 1813, and that he then paid to the
 “ representatives the quinquennial and renewal
 “ fines then due thereon. And the Plaintiffs
 “ further expressly charged, that if Robert Haig
 “ the elder purchased the estate and interest which
 “ the representatives of William Perrott Newburgh
 “ had in the lands, he purchased the same subject
 “ to the lease or leases thereof under which
 “ James Rawson had held the same, and which
 “ had been assigned to Edward Shannon ; and
 “ that the Plaintiffs had lately discovered that the
 “ representatives of William Perrott Newburgh
 “ or Joseph Dickson from time to time renewed
 “ the lease or leases under which they held the
 “ lands, and had obtained one or more new leases
 “ thereof, after the execution of the indenture of
 “ the 22d of June, 1809, and before any assign-
 “ ment thereof to Robert Haig ; and further, that
 “ Robert Haig, after he became possessed thereof,
 “ obtained one or more new leases thereof from
 “ the Bishop of Kilmore, and paid large fines for
 “ the renewal thereof ; but that Robert Haig
 “ refused to discover to the Plaintiffs the dates of
 “ the renewals. And the Plaintiffs further charged,
 “ that Robert Haig obtained a lease of that part
 “ of the lands of Carnan, Killan, and Maybolg,
 “ from the Bishop of Kilmore : He obtained it in
 “ consequence of an agreement made by Joseph
 “ Dickson with the several persons interested in
 “ the lands, that Joseph Dickson should surrender

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“ his lease, and should permit the several persons
 “ interested in the lands under the representatives
 “ of William Perrott Newburgh to take new leases,
 “ each of their own share or proportion thereof.
 “ And the Plaintiffs charged, that the several per-
 “ sons interested in the lease of the lands from the
 “ representatives of William Perrott Newburgh
 “ obtained leases from the Bishop of Kilmore,
 “ each of his or her own share or proportion, at a
 “ proportion of the rent under which the lands
 “ had been theretofore held ; and, amongst others,
 “ that Robert Haig the elder, in consequence of
 “ the agreement, obtained from the Bishop a lease
 “ of that part of the lands of Carnan and Maybolg
 “ which had been theretofore held by James
 “ Rawson. And the Plaintiffs expressly charged,
 “ that Robert Haig, having the estate of the repre-
 “ sentatives of William Perrott Newburgh, and
 “ having a renewal thereof from the said Bishop
 “ of Kilmore, was bound to renew the lease under
 “ which James Rawson held the lands for the
 “ benefit of the Plaintiff.”

The supplemental bill then prayed, “ That the
 “ decree be carried into full and effectual execu-
 “ tion, and that the lands and premises therein
 “ mentioned, and conveyed to Edward Shannon,
 “ his heirs, executors, and administrators, by the
 “ indenture of the 22d of June, 1809, or a com-
 “ petent part thereof, might be set up to be sold
 “ by one of the Masters of the Court ; and that all
 “ proper and necessary parties might join in a con-
 “ veyance or conveyances to a purchaser or pur-
 “ chasers thereof; and that out of the money to arise
 “ by the sale the Plaintiffs might be paid so much of
 “ the sum of 1,250*l.* in the decree mentioned as still
 “ remained unpaid ; and that, if necessary, an ac-

“ count might be taken of how much was due to
 “ the Plaintiffs on foot of the sum of 1,250*l.*; and
 “ that an account might be taken of what sum or
 “ sums of money had accrued due to Plaintiffs on
 “ foot of the two annuities of 300*l.* and 200*l.* since
 “ the pronouncing of the decree, and that the
 “ same might be paid to the Plaintiffs by a short
 “ day to be named; or, in default thereof, that a
 “ competent part of the lands might be sold for
 “ the payment thereof, and that the receiver there-
 “ tofore appointed might be continued to receive
 “ the rents, issues, and profits of the lands and
 “ premises; and that all such new leases or renew-
 “ als of leases as the Defendants might have ob-
 “ tained of such parts of the said lands as were
 “ held under the see of Kilmore might be declared
 “ to be held by them in trust for the Plaintiffs,
 “ and as a security for the payment of the two
 “ annuities.”

To this supplemental bill the Appellant, on the 13th of November, 1823, filed his answer, submitting, “ That the annuities ought not to be charge-
 “ able on the lands, at least not until the Plaintiffs
 “ respectively have contributed to defray their
 “ proportion of rent and renewal fines, and other
 “ expences attending the securing and keeping
 “ alive the interest of James Rawson therein re-
 “ spectively, in case they shall be entitled to renew:
 “ That he claimed to hold and enjoy the lands of
 “ Upper and Lower Carnan and Killan, in the
 “ county of Cavan, discharged of the annuities
 “ granted by James Rawson; inasmuch as Rawson’s
 “ interest therein, which was all he was entitled to
 “ charge, had expired long since, and the Defen-
 “ dant’s title was derived immediately from the
 “ representatives of William Perrott Newburgh,

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“ and was paramount to that of Rawson, by virtue
 “ whereof the Defendant held the same, and his
 “ interest therein is as immediate tenant under the
 “ see of Kilmore; and the Defendant insisted,
 “ that before the Plaintiffs could claim a renewal
 “ of the interest of James Rawson in the premises
 “ from the Defendant, even supposing that they
 “ had not altogether lost and forfeited their rights
 “ to any such renewals, Plaintiffs or their trustee
 “ were bound to account with and pay the Defen-
 “ dant the full amount of all arrears of profit rent,
 “ and renewal and quinquennial fines, due out of
 “ the premises in respect of the interest of Rawson
 “ therein, and their full proportion of all other
 “ costs and expences attending the obtaining the
 “ renewals obtained by the interest under the see
 “ of Kilmore, pursuant to the covenants and sti-
 “ pulations contained in the original lease of the
 “ premises by virtue whereof James Rawson held
 “ the same.”

The Appellant by his answer then stated the original grants, and certain sales, assignments, and renewals of the leases; “ and that the Defendant
 “ paid to Gautier the full sum he had advanced
 “ by the renewal fines in obtaining the leases,
 “ by virtue whereof the Defendant, as he con-
 “ tended, became and was entitled to stand in
 “ the place of Newburgh as immediate tenant
 “ thereof under the bishop, and as such entitled
 “ to receive the rent and fines payable by the re-
 “ presentatives of Rawson and wife, or whoever
 “ else might appear to be the representatives of
 “ the lessees in the leases of the 3d and 7th of
 “ November, 1791, so long as the interest there-
 “ under should be considered to subsist or to have
 “ subsisted; and that the Defendant had accord-

“ ingly obtained a conveyance of Gautier’s interest
 “ in the lands to his own use on or about the 7th
 “ of August, 1814 : That James Rawson having
 “ become a bankrupt, and his property having
 “ vested in his assignees, and having been set up
 “ to be sold by them, the Defendant became the
 “ purchaser, and obtained an assignment from the
 “ assignees of all the reversion, estate, and interest
 “ in the lands, for full and valuable consideration,
 “ subject to such claims and incumbrances created
 “ by James Rawson therein, as upon investigation
 “ should be found legally valid and substantial,
 “ and not expressly subject to the annuities in the
 “ bill mentioned : That the annuities claimed by
 “ the Plaintiffs in their bill, and granted to or in
 “ trust for Faviere, appeared to have been charged,
 “ not only on the lands which were purchased by
 “ the Defendant, but also on the other real estate
 “ of James Rawson and wife, and, amongst others,
 “ on the lands of Monaghanoose and Tullynaskea,
 “ which the Defendant submitted ought to be con-
 “ tributory to bear the charge, if the same should
 “ be considered then in force, or at all sustainable
 “ against the lands and interest purchased by the
 “ Defendant from the assignees and representatives
 “ of Newburgh : That he, neither in 1812 nor
 “ 1813, nor at any time, obtained any renewal of
 “ the original lease of the lands from William
 “ Perrott Newburgh, or from Dickson, or any other
 “ person, or at any time paid the quinquennial or
 “ any fine for renewing same, Defendant not being
 “ under any necessity of renewing the same, as
 “ he, since he became interested in the lands,
 “ held under a prior title, namely, as assignee of
 “ William Perrott Newburgh, and not by virtue
 “ of the title of Rawson or any other ; and he

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“ denied that he purchased the estate of William Perrott Newburgh in the lands, subject to the lease or leases under which Rawson held the same, except so far as the representatives of Newburgh were themselves bound and subject to the leases. He admitted that some of the assignees or representatives of Newburgh had occasionally renewed their own interest under the bishop after the execution of the deed of the 22d of June, 1809 ; that the Defendant himself renewed the same, and paid large renewal fines on so doing to the bishop ; that he obtained the last renewal in or about the year 1816 ; and that the only agreement under which the Defendants or Dickson obtained a renewal of the Newburgh interest in the lands, was that the several purchasers of the several lots or parts of the Newburgh lease or leases unto the bishop should, on payment of their proportions of the renewal fines due, obtain separate renewals of their several shares of the said lands.”

A further supplemental bill was, on the 27th of January, 1824, filed by the Respondents against the Appellant and others, in which it was, among other things, charged ; “ That Broughal Newburgh, by a certain lease, bearing date on or about the 3d of November, 1791, demised the lands of Killan to Patrick Smith for a term of twenty-one years, at the yearly rent of 26*l.* ; and that thereby Broughal Newburgh, for himself, his executors, administrators, and assigns, covenanted and agreed, that he, his executors, administrators, and assigns, would, as often as he or they should renew the leases of the several lands and premises which they held or might hold under the bishop of Kilmore or his successors, for ever renew his

“ or their term of the demised premises to Patrick
 “ Smith, his executors, administrators, and assigns;
 “ Patrick Smith paying all arrears of rent, and
 “ also for every 50*l.* which Broughal Newburgh,
 “ his executors, administrators, or assigns, should
 “ be raised or advanced by the bishop, the sum of
 “ one shilling in the pound for all such rent as
 “ Patrick Smith was thereby bound to pay unto
 “ Broughal Newburgh, his executors, adminis-
 “ trators, or assigns; and that Patrick Smith, his
 “ executors, administrators, or assigns, should also
 “ pay to Broughal Newburgh the further sum of
 “ 13*l.* sterling, by way of fine, at the end or
 “ expiration of every five years during the demise.
 “ And the plaintiffs further charged, that the
 “ lands of Upper and Lower Carnan were held
 “ under a lease bearing date on the 7th of Novem-
 “ ber, 1791, made by Broughal Newburgh to one
 “ Charles Stuart, for a term of twenty-one years;
 “ at the yearly rent of 115*l.* 5*s.*, payable as therein
 “ mentioned; in which lease is contained a cove-
 “ nant by Broughal Newburgh, for himself, his
 “ executors, administrators, and assigns, that he
 “ and they would, as often as he or they should
 “ renew the leases of the lands and premises
 “ which they held or might hold under the Bishop
 “ of Kilmore or his successors, for ever renew
 “ his or their term of the demised premises to
 “ Charles Stuart, his executors, administrators, and
 “ assigns, Charles Stuart, his executors, adminis-
 “ trators, and assigns, paying all arrears of rent
 “ then due; and also that Charles Stuart should
 “ pay to Broughal Newburgh, his executors,
 “ administrators, and assigns, the further sum of
 “ 57*l.* 12*s.* 6*d.* at the end or expiration of every
 “ five years during the demise; and also, as

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“plaintiffs believe, paying some further renewal fine; but plaintiffs cannot set forth the particulars of any such further renewal fine, inasmuch as the lease is in the custody or possession of Robert Haig, and the plaintiffs had no copy.”

“That by a deed of partition of the 10th day of May, 1809, the lands of Killan were assigned to James Rawson, subject to the rent and fines in the lease of the 10th of November, 1791, mentioned; and that one fifth part of the lands of Upper and Lower Carnan were also assigned to James Rawson, subject to a proportion of the rent and fines mentioned in the lease of the 7th of November, 1791. And the plaintiffs charge, that Rawson remained in the possession of the lands of Killan and Carnan, from the execution of the deed of the 10th of May, 1809, until he became a bankrupt, and whilst he so remained in possession paid the proportion of the rent and renewal fines reserved by and due in respect of the two several leases, which was payable out of that part of the lands allotted to James Rawson as aforesaid; and that after James Rawson became a bankrupt, Joseph Dickson and Michael Byrne, his assignees, entered into possession of the lands of Killan and Carnan, and whilst they remained in possession thereof paid the proportion of the rent and fines reserved by and due in respect of the two leases of the 3d and 7th days of November, 1791, which were payable out of the part and portion of the lands allotted to James Rawson.”

“That after James Rawson became a bankrupt, his estate and interest in the lands of Killan and Carnan were, in the month of July, in the year 1814, set up to be sold by auction at the Royal

“ Exchange, Dublin, subject to the several charges,
 “ incumbrances, and annuities affecting the same,
 “ and, amongst others, subject to plaintiffs’ two
 “ annuities ; and that Robert Haig, at the sale, bid
 “ a sum of 3,500*l.* for the same, together with other
 “ lands which had been the estate of James
 “ Rawson, and was then declared the purchaser
 “ thereof; and that by deed bearing date on or
 “ about the 7th day of September, 1814, the
 “ estate and interest of James Rawson in the
 “ lands of Killan and Carnan, under and by virtue
 “ of the two leases of the 3d of November, 1791,
 “ and the 7th of November, 1791, were conveyed
 “ and assigned to Robert Haig, and that Robert
 “ Haig thereupon entered into possession of the
 “ lands and premises, and paid the rent and fines
 “ for the same to Cornelieus Gautier, or to some
 “ other person having the estate and interest of
 “ Broughal Newburgh therein.”

“ That Cornelieus Gautier afterwards, by deed,
 “ conveyed and assigned all his estate and interest
 “ therein to Robert Haig; and that Robert Haig
 “ thereupon became entitled to the rents and fines
 “ reserved and payable in respect of the leases
 “ under which James Rawson had held the lands
 “ and premises; and that Robert Haig was then
 “ in the possession of the lands and premises
 “ under and by virtue of the conveyance or assign-
 “ ment thereof by the assignees of James Rawson,
 “ as hereinbefore mentioned, and remained in
 “ possession thereof until the appointment of a
 “ receiver in the year 1816.”

“ That on the purchase from the assignees of
 “ James Rawson, Robert Haig was allowed credit
 “ out of the purchase money for rent and fines
 “ then due in respect of the leases of the 3d and

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“ 7th of November, 1791, or that the lands and
 “ premises were expressly sold subject thereto, or
 “ otherwise that the rent and fines had been there-
 “ tofore paid and discharged; that the receiver
 “ in the cause had regularly paid the rent payable
 “ by Robert Haig to the Bishop of Kilmore;
 “ and that the Plaintiffs had no notice until lately
 “ of the claim of Robert Haig to any further rent
 “ or fines; and that Robert Haig refused to dis-
 “ cover to the Plaintiffs the particulars of the
 “ covenants for renewal contained in the lease of
 “ the 7th of November, 1791; that the Plaintiffs
 “ did not claim to be entitled to the interest which
 “ Broughal Newburgh had in the lands of Killan
 “ and Carnan, but only to the interest which
 “ James Rawson had therein under and by virtue
 “ of the two leases of the 3d and 7th of November;
 “ 1791, and of the covenants for renewal therein
 “ contained, as a surety for their two annuities. ”

“ That Robert Haig obtained a renewal or new
 “ lease of the lands of Carnan and Killan from
 “ the Bishop of Kilmore in the year 1816; but
 “ that Robert Haig never gave Plaintiff, or any
 “ of the persons interested in the lease of the 3d
 “ and 7th of November, 1791, notice to renew. ”

The further supplemental bill then, among other
 things, prayed, “ That if it should be found neces-
 “ sary, the Defendants might severally answer,
 “ when required, in the usual way; and that
 “ Robert Haig might set forth what renewal fines
 “ and rent he claimed in respect of the leases of
 “ the 3d and 7th of November, 1791, and the par-
 “ ticulars of the covenants for renewal contained
 “ in the lease of the 7th of November, 1791; and
 “ that, in addition to the relief prayed by the Plain-
 “ tiffs last-mentioned bill, it might be decreed that

“ the Plaintiffs were entitled to a renewal of the
 “ leases of the 3d and 7th of November, 1791,
 “ as a security for the payment of the said two
 “ annuities, upon such terms as should be fit and
 “ reasonable ; and that Robert Haig might be or-
 “ dered to execute such renewals as a security for
 “ the two annuities, pursuant to the covenants in
 “ the leases contained.”

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By the answer of the Appellant, which was filed
 on the 28th of April, 1824, he “ said he believed
 “ that the lands of Upper and Lower Carnans were
 “ held under a lease made by Broughal Newburgh
 “ to Charles Stewart, for a term of years, at the
 “ yearly rent of 115*l*. 5*s*., and that there was in
 “ the lease contained a covenant by the lessor, for
 “ himself, his executors, administrators, and as-
 “ signs, for the renewal thereof as often as he
 “ should renew his lease of the said lands with the
 “ bishop of Kilmore or his successors for ever, on
 “ such terms as in the lease mentioned.

“ That by deed of partition of the date in the
 “ bill mentioned the lands of Killan were assigned
 “ to James Rawson, subject to the rent and fines
 “ mentioned in the article of the 3d of November,
 “ 1791; and that one-fifth part of the lands of
 “ Upper and Lower Carnans was assigned to James
 “ Rawson, subject to a proportion of the rent and
 “ fines mentioned in the lease under which the
 “ same were held; and that James Rawson re-
 “ mained in possession of the lands of Killan
 “ and Carnans from the execution of the deed of
 “ partition until he became a bankrupt. He ad-
 “ mitted, that after James Rawson became a bank-
 “ rupt his assignees entered into possession of the
 “ lands of Killan and Carnans, but did not believe

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“ that while they were in possession thereof they
 “ paid the proportion of rent and fines due in re-
 “ spect of James Rawson’s interest in the lands:”
 And then, after setting forth the manner in which
 the interest of Broughal Newburgh came to be
 vested in Cornelius Gautier, and the renewal fines
 in respect of the same paid by Cornelius Gautier
 to the bishop of Kilmore, “ he admitted that
 “ Gautier, after he obtained such renewal of the
 “ leases of the lands, sold his estate and interest
 “ therein, to the Defendant; and that the Defen-
 “ dant paid him a large sum of money for the same,
 “ distinct from the amount of the fines for renewal
 “ which he so paid to the bishop for renewing the
 “ same, and which the Defendant also paid to him,
 “ amounting to 1,908*l.* 19*s.* 7*d.*; but he said that
 “ he was not, at the time when he so purchased
 “ and obtained a conveyance of Gautier’s interest
 “ in the lands, as the immediate tenant of the see
 “ of Kilmore, in possession of the lands under a
 “ conveyance by the assignees of Rawson of his
 “ derivative interest therein, as by the bill sup-
 “ posed, Rawson’s interest not having been con-
 “ veyed to the Defendant at the time when he
 “ purchased the interest of Gautier.”

“ He denied that, in making the purchase from
 “ the assignees of Rawson, he was allowed credit
 “ out of the purchase-money for the rent and re-
 “ newal fines then due in respect of the article
 “ and lease under which Rawson had held the
 “ same, or for any part thereof, and that the pre-
 “ mises were expressly sold subject to the payment
 “ thereof by Defendant, no agreement or under-
 “ standing on the subject having been entered
 “ into on the occasion of the purchase, and he

“denied that such rent or fines had been previously paid.”

The cause was heard on the 15th of February, 1825, when it was declared, “That the Plaintiffs, Sir William Jackson Homan, Henry Arabin, Maria Faviere, Louisa Howse, Thomas Parsons Poe and Gertrude his wife, as against the Defendant Robert Haig, were entitled to have the lease of the 3d of November, 1791, of the lands of Killan, and the benefit and advantage thereof; and also the lease of the 7th of November, 1791, of the lands of Upper and Lower Carnan, deemed and taken to have been renewed for the benefit of the Plaintiffs, and as a security for the two annuities of 300*l.* and 200*l.* a year, and of the arrears thereof, for the terms respectively of twenty-one years from the date of the last renewal or new lease of the lands and premises, obtained by the Defendant Robert Haig from the Bishop of Kilmore. And it was further ordered, adjudged, and decreed, that the trusts of the deed of the 22d day of June, 1809, be carried into execution. And it is referred to one of the Masters of the Court to take an account of 300*l.* and 200*l.*; and that in taking the account, &c., the Master to take an account of all debts, charges, and incumbrances affecting the lands and premises in the pleadings mentioned, prior to the Plaintiff’s annuities; and also an account of all debts, charges, and incumbrances whatsoever affecting the estate and interest of James Rawson deceased, in the land and premises in the pleadings mentioned, and their priorities in respect of each other. And it was further ordered, ad-

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“ judged, and decreed, that in taking the accounts
“ the said Master do inquire and report particularly
“ as to the rights of the Defendant Rebecca
“ Rawson, the widow of James Rawson, and her
“ minor son Thomas Rawson, and all circum-
“ stances relating thereto. And it was further
“ ordered, that all persons having any debts,
“ charges, or incumbrances affecting the lands
“ and premises in the pleadings mentioned, or
“ any part thereof, should be at liberty to come
“ in and prove their respective demands.”

The Master, on the 13th of January, 1826,
among other things, reported, “ That James
“ Rawson, by the indenture, conveyed and assured
“ the several lands, hereditaments, and premises
“ in the pleadings mentioned, whereof he was
“ seized in fee, to Edward Shannon, his heirs and
“ assigns, and assigned the lands and premises in
“ the pleadings mentioned, whereof he was pos-
“ sessed for terms of years, to Edward Shannon,
“ his executors and administrators, upon trust, in
“ the manner therein mentioned, to secure the
“ payment of the two annuities; and that James
“ Rawson and Rebecca his wife did, by the
“ indenture, in pursuance and execution of a
“ certain power therein recited, limit and appoint
“ unto Edward Shannon, his heirs and assigns,
“ the lands of Monaghanoose; and did also limit
“ and appoint to Edward Shannon, his executors,
“ administrators, and assigns, the lands of Tully-
“ naskea, upon trust, to secure the payments of
“ the two annuities; and he found indorsed on
“ the deed, in the attestation thereof, the following
“ memorandum: ‘ Signed, sealed, and delivered, it
“ ‘ being first agreed upon by and between the

“ ‘ parties hereto, that the several lands and
 “ ‘ premises bequeathed to Rebecca Rawson
 “ ‘ under the will of Harriet Smith, her sister,
 “ ‘ deceased, shall not be resorted to unless the
 “ ‘ other towns, lands, and premises herein charged
 “ ‘ with the payments of the annuities of 300*l*.
 “ ‘ and 200*l*. to Maximilian Faviere, his heirs and
 “ ‘ assigns, shall be insufficient to pay the same,
 “ ‘ it being the true intent and meaning of the
 “ ‘ parties hereto, that the lands and premises
 “ ‘ of James Rawson shall always in the first
 “ ‘ instance be resorted to for payment of the
 “ ‘ annuities : and he found that there was due
 “ ‘ and owing to the Plaintiffs, Maria Faviere,
 “ ‘ Louisa Howse, Thomas Parsons Poe and
 “ ‘ Gertrude his wife, on foot of the two annui-
 “ ‘ ties of 300*l*. and 200*l*. a year, up to and for
 “ ‘ the 1st day of November, 1825, the sum of
 “ ‘ 2,305*l*. 11*s*. 9*d*. : and he further found, that
 “ ‘ the two annuities were the first charge
 “ ‘ and incumbrance on the lands and premises
 “ ‘ in the pleadings mentioned, save only the
 “ ‘ arrears of rent and fines therein-after mention-
 “ ‘ ed to be due to the Defendant Robert Haig ;
 “ ‘ and save also the legacy therein-after men-
 “ ‘ tioned to be due to the Defendant Rebecca
 “ ‘ Rawson, administratrix of Patrick Rawson
 “ ‘ deceased, which were respectively charged on
 “ ‘ certain parts of the lands and premises in the
 “ ‘ pleadings mentioned prior to the Plaintiff’s
 “ ‘ demand.’ ”

The Master also found, “ that the lands of
 “ Killan were the estate in fee of the see of
 “ Kilmore, and that the lands were held in the
 “ year 1791 by Broughal Newburgh, as immediate

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“tenant to the then Bishop of Kilmore; and
 “that by certain articles of agreement made
 “under the seal of Broughal Newburgh of the
 “one part, and Patrick Smith of the other part,
 “Broughal Newburgh demised the lands of Killan
 “to Patrick Smith for a term of twenty-one years,
 “at the yearly rent of 26*l.* sterling, payable
 “half-yearly; and that Broughal Newburgh, for
 “himself, his executors, administrators, and as-
 “signs, covenanted with Patrick Smith, his execu-
 “tors, administrators, and assigns, that so often
 “as he or they should for ever thereafter renew
 “the lease of the said lands and premises which they
 “then held, or thereafter might hold, from the
 “then Bishop of Kilmore or his successors, that
 “Broughal Newburgh, his executors, adminis-
 “trators, and assigns, would renew his or their
 “term of demised premises to Patrick Smith, his
 “executors, administrators, and assigns, he and
 “they paying all rent and arrears of rent; and
 “also for every 50*l.* which Broughal Newburgh,
 “his executors, administrators, and assigns, should
 “be raised or advanced by the Bishop of Kilmore
 “or his successors in the rent or fines of the said
 “lands, Patrick Smith, his executors, adminis-
 “trators, and assigns, should advance the sum of
 “one shilling in the pound for all such rent as
 “Patrick Smith was thereby bound to pay to
 “Broughal Newburgh, his executors, adminis-
 “trators, and assigns, and also should pay the
 “further sum of 13*l.* by way of a fine, at the end
 “of every five years, during the demise. He found
 “that there was due to the Defendant Robert
 “Haig, for rent of the lands of Upper and Lower
 “Carnan, which rent has accrued due since the

“appointment of the receiver in the original
 “cause, the sum of 167*l.* 15*s.* 10*d.* which had
 “not been paid by the receiver; which sum of 157*l.*
 “15*s.* 10*d.*, together with the renewal fines due
 “to Robert Haig, as assignee of Broughal New-
 “burgh, for keeping alive the interest in the lands,
 “with interest for the same from the respective
 “times when the same were due and payable,
 “the Master thereby found was the first charge
 “on the lands of Upper and Lower Carnan.”

The Master also found, “That the lands of
 “Killan, under which Broughal Newburgh, the
 “lessor in the lease of the 3d of November, 1791,
 “held the same, had been from time to time
 “renewed; and that the estate and interest of
 “Broughal Newburgh therein had, previous to
 “the month of August, 1814, come to and vested
 “in Cornelius Gautier; and that Cornelius Gautier,
 “by deed bearing date the 17th of August, 1814,
 “reciting that the then Bishop of Kilmore had by
 “lease, bearing date the 20th of December, 1812,
 “demised the lands of Killan to him for a term of
 “twenty-one years, from the 1st of May then last,
 “for the considerations therein mentioned, convey-
 “ed and assigned the lands of Killan to Robert
 “Haig, his executors, administrators, and assigns,
 “for the then residue of the term of twenty-one
 “years; and he found that, by virtue of the said
 “indenture, Robert Haig became possessed of
 “and entitled to the estate and interest of
 “Broughal Newburgh, the lessor in the lease of
 “the 3d of November, 1791, in the lands of
 “Killan; and that he was also, by virtue of the
 “sale at the Royal Exchange, and of the deed of
 “the 7th of September, 1814, possessed of and
 “entitled to the estate and interest, and benefit

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“ of renewal, of Patrick Smith, the lessee therein,
“ in one-fifth part of the lands and premises.”

The Master also found, “ That there was due
“ to Robert Haig, for rent of the lands of Kil-
“ lan, the sum of 211*l.* 14*s.* 2*d.*, which, together
“ with such fines as Robert Haig was entitled to
“ out of the lands, together with interest, was the
“ first charge on the lands of Killan.”

The Master also found, “ That there were no
“ charges or incumbrances on the lands and
“ premises in the pleadings mentioned prior to
“ the Plaintiff’s annuities, save the said sum of
“ 167*l.* 15*s.* 10*d.* due to Robert Haig for ar-
“ rears of rent, renewal fines, and interest out of
“ the lands of Carnan ; and save the sum of
“ 211*l.* 14*s.* 2*d.* due to Robert Haig for arrears of
“ rent, renewal fines, and interest out of the lands
“ of Killan ; and except the legacy of 202*l.* due to
“ Rebecca Rawson as administratrix, which legacy
“ is a charge on the lands of Monaghanoose and
“ Tullynaskea. And he found, that the two
“ annuities of 300*l.* and 200*l.* granted to Maxi-
“ milian Faviere, and now vested in the Plaintiffs
“ or their trustees, is the first incumbrance on the
“ lands and premises in the pleadings mentioned,
“ except the sums due to Robert Haig and
“ Rebecca Rawson.”

To this report the Respondents, Maria Faviere,
Louisa Howse, Thomas Parsons Poe and Gertrude
his wife, filed the three following exceptions :—

“ *First Exception.*—For that the said Master
“ has, in and by his said report, reported that a
“ certain sum of 167*l.* 15*s.* 10*d.* therein mentioned,
“ together with the renewal fines due to the said
“ Robert Haig, as assignee of Broughal Newburgh,
“ for keeping alive the interest in said lands, with

“ interest on the same from the respective times
 “ when same were due and payable, is the first
 “ charge on the lands of Upper and Lower Carnan
 “ in the pleadings mentioned ; whereas the said
 “ Master ought not to have reported that any
 “ renewal fines were due to the said Robert Haig,
 “ as assignee of Broughal Newburgh, for keeping
 “ alive the interest in said lands, or that interest
 “ was due to the said Robert Haig on the foot of
 “ such fines.

“ *Second Exception.*—For that, supposing that
 “ said Master was warranted in reporting that any
 “ fine or fines was or were due to said Robert Haig
 “ in respect of said lands of Upper and Lower
 “ Carnans, said Master should have reported such
 “ fine or fines only as are payable under and by
 “ virtue of the said lease of said lands of the 7th
 “ day of November, 1791, in the pleadings men-
 “ tioned, and of the covenants therein contained,
 “ to be due to the said Robert Haig, and to be a
 “ charge on the said lands, and should not have
 “ reported that any interest was due or payable on
 “ or in respect of such fines.

“ *Third Exception.*—For that the said Master,
 “ in and by his said report, has reported that a
 “ certain sum of 211*l.* 14*s.* 2*d.* therein mentioned,
 “ together with such fines as the said Robert Haig
 “ is entitled to out of said lands, together with
 “ interest as before stated, is the first charge on
 “ the lands of Killan in the pleadings mentioned ;
 “ whereas the said Master ought not to have
 “ reported that any interest was or is due or pay-
 “ able to the said Defendant and Robert Haig upon
 “ or in respect of any such fines.”

On the 1st of March, 1826, the cause was heard

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on the report, exceptions, and merits, when it was decreed, so far as relates to the said exceptions, “ That it be referred to Roderick Connor Esquire “ to vary the report, pursuant to the rules made “ on the special point in the report, and on excep- “ tions taken.”

On the 6th of June, 1826, the Master, in pursuance of the decree, among other things, reported, “ That by deed of the 22d of June, 1809, made “ between James Rawson and Rebecca Rawson “ otherwise Smith of the first part, Maximilian “ Faviere deceased of the second part, and the De- “ fendant Edward Shannon of the third part, the “ said James Rawson, for the consideration therein “ mentioned, granted, bargained, and sold to Max- “ imilian Faviere, his heirs and assigns, an annuity “ or yearly rent-charge of 300*l.* a year during the “ natural life of the Plaintiff Louisa Howse his “ daughter, and also an annuity or yearly rent- “ charge of 200*l.* for the natural life of the Plain- “ tiff Gertrude Poe his daughter, and thereby “ charged the said *two annuities* on the several “ lands, hereditaments, and premises in the plead- “ ings mentioned, being the town and lands of “ Aughnakee, Shancrock, Tullyvaltry, and Tony- “ fole, and also upon the town and lands of “ Upper and Lower Carnan, and also upon the “ town and lands of Killan, &c.; and that James “ Rawson, by the said indenture, conveyed and “ assured the lands of Aughnakee, Shancrock, “ Tullyvaltry, and Tonyfole, whereof he was “ seised in fee, to Edward Shannon, his heirs and “ assigns, upon trust, to secure the payment of the “ said two annuities; and that James Rawson, by “ the said indenture, assigned and conveyed the

“ lands of Upper and Lower Carnan and Killan,
 “ whereof he was possessed for terms of years, to
 “ Edward Shannon, his executors, administrators,
 “ and assigns, for the several terms therein then to
 “ come and unexpired, and for all future renewals
 “ thereof, upon trust to secure the payment of the
 “ said two annuities; and that James Rawson
 “ and Rebecca Rawson his wife, by the said inden-
 “ ture, in pursuance and execution of a certain
 “ power therein recited, limited and appointed
 “ unto the said Edward Shannon, his heirs and
 “ assigns, the lands of Monaghanoose; and also
 “ limited and appointed to Edward Shannon, his
 “ executors, administrators, and assigns, the lands
 “ of Tullynaskea, upon trust, to secure the pay-
 “ ment of said two annuities; which lands of
 “ Monaghanoose and Tullynaskea were bequeathed
 “ to Rebecca Rawson by her late sister Harriet
 “ Smith.”

The Master by his report then stated, as in his former report*, “ a memorandum indorsed on the deed, declaring it to be the true intent and meaning of the parties that the lands and premises of James Rawson should be always, in the first instance, resorted to for payment of the annuities.”

The Master also reported, “ That there was due and owing to the Plaintiffs, Maria Faviere, Louisa Howse, Thomas Parsons Poe and Gertrude his wife, on foot of the two annuities of 300*l.* and 200*l.* a year, up to the 1st day of May, 1826, the sum of 2,555*l.* 11*s.* 9*d.*; and that the said two annuities were the *first charge* and incumbrance

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* *Ante*, pp. 404, 5.

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“ on the lands and premises in the pleadings mentioned, save only the legacy due to the Defendant Rebecca Rawson, and the interest thereof, which legacy was a charge on the lands of Monaghan-oose and Tullynaskea only, prior to the Plaintiff’s demand.

The Master also reported, “ That on the 22d of June, 1809, James Rawson was in possession of the lands and premises in the pleadings mentioned ; and that he remained and continued in possession thereof until the month of November, 1810, when he became a bankrupt, and that a commission of bankruptcy issued against him on the 17th day of November, 1810, and that Michael Byrne and Joseph Dickson were chosen assignees of the estate and effects of James Rawson under the commission ; and that Michael Byrne and Joseph Dickson, as such assignees, entered into possession of the lands and premises in the pleadings mentioned ; and that on or about the day of July, 1814, they caused the same to be set up to be sold at the Royal Exchange in the city of Dublin, and that the Defendant Robert Haig became the purchaser thereof ; that the same were accordingly conveyed to him by indenture bearing date the 7th day of September, 1814, and thereupon Robert Haig entered and remained in possession, and in receipt of the rents and profits thereof, until the 1st day of February, 1816, when a receiver was appointed in the original cause, and that such receiver had been since in receipt of the rents and profits thereof.”

The Master also reported, “ That Robert Haig, from the 7th September, 1814, up to the month

“ of February, 1816, being in possession of the
 “ lands and premises, received the rents and profits
 “ thereof, and applied and disposed of the same in
 “ discharge of part of the arrears due to the Plain-
 “ tiffs and to some other of the annuitants ; and
 “ that since the appointment of a receiver in the
 “ original cause the rents and profits of the lands
 “ and premises had been paid and applied, pur-
 “ suant to orders of the Court from time to time,
 “ made in the original cause.”

The Master also reported, “ That the lands of
 “ Upper and Lower Carnan were part of the lands
 “ of Maybolg, which were the estate in fee of the
 “ see of Kilmore ; that in the year 1791 the lands
 “ of Carnan were held for a certain term of years
 “ by one Broughal Newburgh ; and that Newburgh,
 “ as immediate tenant to the then bishop of Kil-
 “ more, by deed bearing date the 7th of March,
 “ 1791, demised the same to one Charles Stewart
 “ for a term of twenty-one years, at the yearly rent
 “ of 115*l.* 5*s.* ; and the lease contained a covenant
 “ on the part of Broughal Newburgh, his execu-
 “ tors, administrators, and assigns, that as often
 “ as they should renew the lease of the lands which
 “ they held or might hold under the bishop of
 “ Kilmore or his successors, they would renew his
 “ or their term of the demised premises to Charles
 “ Stewart, his executors, administrators, and
 “ assigns, he and they paying all arrears of rent
 “ then due ; and also that Charles Stewart, his
 “ executors, administrators, and assigns, should
 “ pay to Broughal Newburgh, his executors,
 “ administrators, and assigns, the further sum of
 “ 57*l.* 12*s.* 6*d.*, by way of a fine, at the end or expi-
 “ ration of every five years during the demise, and

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“ also the sum of 5*l.* on every 50*l.* which the bishop
“ of Kilmore or his successors should increase the
“ fine payable by Newburgh to the bishop or see
“ of Kilmore.”

The Master also reported, “ That the lands of
“ Maybolg, and the estate and interest of Charles
“ Stewart therein, by virtue of the lease, vested
“ in Patrick Smith, who was the father of the
“ Defendant Rebecca Rawson;” and as to the
lands of Killan he then made the same statement
as in his former report.

The Master also reported, “ That by a deed of
“ partition of the 10th of May, 1809, the lands of
“ Upper and Lower Carnan were allotted and
“ conveyed to James Rawson, as and for his fifth
“ part of the lands of Maybolg, subject to the
“ payment of one-fifth part of the annual rent of
“ 115*l.* 5*s.*, and to the fifth of the quinquennial
“ fine of 57*l.* 12*s.* 6*d.*, and also to the fifth of the
“ additional or increased sum of 5*l.* for every 50*l.*
“ to be charged by the bishop of Kilmore or his
“ successors, and paid by Broughal Newburgh,
“ his executors, administrators, and assigns; and
“ that the lands of Killan had been also allotted
“ and conveyed to James Rawson, subject to the
“ payment of the yearly rent of 26*l.* sterling, and
“ to one shilling in the pound for every 50*l.* of
“ the fine of the lands of Killan as should be
“ raised by the bishop, and to the further sum
“ of 13*l.* by way of a fine, at the end of every five
“ years, during the term; and also that the lands
“ of Monaghanoose were conveyed to William
“ Corbett and William Thomas Briscoe and their
“ heirs, upon trust, for such uses as should there-
“ after be declared of and concerning the same

“ by any deed or deeds to be executed by James
 “ Rawson and Rebecca his wife, notwithstanding
 “ her coverture, and attested by two credible
 “ subscribing witnesses; and in default of such
 “ appointment, and subject to all such estate and
 “ interest as should be created in pursuance
 “ thereof, to the use of James Rawson and Re-
 “ becca his wife, and the survivor of them, and
 “ to the heirs and assigns of Rebecca; and that
 “ the lands of Tullynaskea were by the said deed
 “ assigned and conveyed to William Corbett and
 “ William Thomas Briscoe, their executors, admi-
 “ nistrators, and assigns for the residue of the
 “ term of years thereof, and all future renewals
 “ thereof, upon trust for such uses as should
 “ thereafter be declared of and concerning the
 “ same by any deed or deeds to be executed by
 “ James Rawson and Rebecca his wife, notwith-
 “ standing her coverture, and attested by two
 “ credible subscribing witnesses; and in default of
 “ such appointment, and subject to all such estate
 “ and interest as should be made or created in pur-
 “ suance thereof, to the use of James Rawson and
 “ Rebecca his wife, and the survivor of them,
 “ and the executors, administrators, and assigns
 “ of James Rawson.”

On the 27th of June, 1826, the cause was heard
 on the Master's further report, one exception
 taken thereto by the Respondents, and also on
 the merits, when it was ordered and decreed,
 “ That the Defendants, or any of them, do pay to
 “ the Plaintiffs the amount of the arrears of their
 “ annuities as reported due to them, together with
 “ their costs in this cause, as directed by the former
 “ decree, and the costs incurred by the Plaintiffs

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“ and their trustees in this cause, and in the
 “ causes instituted by the Defendants, William
 “ Robinson and Elizabeth his wife, and Anthony
 “ L'Estrange; and in default of the same being
 “ so paid in six calendar months, to be computed
 “ from the date of the decree, it was further
 “ ordered, adjudged, and decreed, that the Master
 “ in the cause should set up and sell to the best
 “ bidder the lands and premises in the pleadings
 “ mentioned, or a competent part thereof, for pay-
 “ ment of Plaintiff's arrears of annuities and costs,
 “ as directed by the former decree, and all such
 “ arrears and costs as may accrue from the date
 “ of the report of the 6th June, 1826, subject to
 “ the Plaintiff's two annuities, but released and
 “ discharged from the subsequent annuities of
 “ the Defendants, Anthony L'Estrange, William
 “ Robinson and Elizabeth his wife, and Rebecca
 “ Rawson; and it was further ordered, that the
 “ lands and premises comprised in the deed of
 “ marriage settlement of the 11th day of March,
 “ 1803, executed on the marriage of the Defen-
 “ dant Rebecca Rawson with James Rawson
 “ deceased, be in the first instance sold, subject,
 “ as aforesaid, for payment of the arrears of Plain-
 “ tiff's annuities and costs; and if the sum to
 “ arise thereby should prove insufficient for pay-
 “ ment thereof, it was further ordered that the
 “ Master should set up and sell the remaining
 “ lands of Monaghanoose and Tullynaskea, to
 “ which the Defendant Rebecca Rawson became
 “ entitled under the will of her sister Harriet
 “ Smith, for payment of the arrears of the Plain-
 “ tiff's annuities and costs, but subject to the
 “ Plaintiff's two annuities: And it was further

“ordered, that all proper and necessary parties
 “should join the Master in proper deeds of convey-
 “ance to such person or persons as should become
 “the purchaser or purchasers of the lands and pre-
 “mises, or any part thereof; and after payment
 “of the arrears of the Plaintiff’s annuities and
 “costs, it was further ordered, that the several
 “Defendants should be at liberty from time to
 “time to apply to the Court to be paid out of the
 “surplus proceeds of such sale or sales the sums
 “reported due to them, together with their costs,
 “pursuant to the former decree, and according to
 “their priority, as reported: And it was further
 “ordered, that the receiver, heretofore appointed
 “over the lands and premises in the pleadings
 “mentioned, should be continued, for payment of
 “the accruing gales of the Plaintiff’s annuities,
 “until further order.”

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The appeal was against the decrees and orders, respectively dated the 15th February, 1825, the 1st March, 1826, and the 27th June, 1826.

For the Appellant.—Sir E. Sugden and Mr. J. Miller.

The effect of the decrees and orders of the Lord Chancellor of Ireland, dated respectively the 15th of February, 1825, 1st of March, 1826, and 27th of June, 1826, is to confound together the two sorts of estates and interests which the Appellant has acquired in the lands of Upper and Lower Carnan and Killan, which ought to be carefully kept distinct from one another, and thereby either to hold the Appellant personally liable for the payment of the annuities in question, or to keep on foot the subleases of the lands out of

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which they are payable, while at the same time the Appellant is not allowed, as assignee of Broughal Newburgh, to exact from himself, for keeping on foot the sublease, those rents and renewal fines to which he would have been incontestibly entitled if the sublease had been in the hands of a stranger.

The Appellant, by the deed of conveyance of the 7th of August, 1814, having become assignee of the interest of Broughal Newburgh in the lands so demised to him by the Bishop of Kilmore, paramount to the interest of Rawson, on which alone the Respondent's annuities were charged, is entitled to stand on such title, and to claim the benefit of every right, rent, and fines for renewal, which Newburgh could himself have claimed in case he had not assigned his interest. The Appellant was not under any personal obligation to keep on foot the derivative interest which had belonged to Rawson, unless the persons interested in renewing and keeping alive such sub-interest, or their trustee, Edward Shannon, were willing to pay the rents and renewal fines, payable to the Appellant as assignee of the interest of Broughal Newburgh, more especially as the Appellant had not entered into any covenant or engagement to pay the annuities, or to keep in force the sublease and interest on which they were charged.

The first trust of the term in the lands created and vested in Edward Shannon by the annuity deed of the 22d June, 1809, for paying and securing the annuities to Maximilian Faviere, was for the express purpose that Edward Shannon might, in the first place, out of the rents, issues,

and profits, pay and keep down the head-rent and renewal fines payable in respect of James Rawson's interest. Such rent and renewal fines were by the deed made and agreed to be a paramount charge upon the lands, prior to any claim of the annuitants, and independent of the estate and claim of the Appellant, as assignee of Cornelius Gautier, who was the assignee of Newburgh. The arrears of rent and renewal fines payable in respect of Rawson's estate and interest ought, consequently, to have been decreed to be paid to the Appellant as such assignee before he should have been required or decreed to renew, or be considered as having renewed the decree for the benefit of the annuitants.

The annuities granted to Faviere were, by the deed granting the same, charged upon and made payable out of other lands belonging to James Rawson and his wife, as well as the lands of Carnans and Killan; and even though the Appellant, as the assignee of Rawson, should be held bound to keep the interest in the lands of Carnans and Killan on foot for the benefit of the annuitants, yet the Appellant would in that case be entitled to have the rents and profits of the other lands applied, pursuant to the express trusts of the deed of annuity, to pay and keep down a proportional part of the rent and renewal fines due to the reversioner of the lands of Upper and Lower Carnans and Killan in respect of Rawson's sub-interest therein.

For the Respondent L' Estrange.—The Solicitor General.

For the other Respondents.—Mr. Pemberton.

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The Appellant is in the same situation as Rawson the under-lessee. He could not have thrown the charge upon the annuitants. The trustee for the annuitants was bound to pay the fines and rents. Rawson could never have contended that the annuitants were bound to pay the rents and fines. The Appellant took the property from Rawson, with notice, when, in 1814, he being bankrupt, his interest was put up to sale and purchased by the Appellant. He then became sub-lessee by purchase; and the Respondents acquired the same equity as they had before against Rawson—to require, under the trust, a reversal of the lease, and to have the fines and rents paid. The Appellant, on account of this state of the property, made his purchase at a lower price. The contract for purchase of the under-lease was in July, 1814. In August the Appellant acquired the title of head landlord. The annuities were paid afterwards. It is said that they were paid out of other property. That is immaterial; and if true, it does not apply to L'Estrange, whose annuity was charged on the under-lease only. In the deed charging the annuities there was a covenant binding Rawson, and therefore binding the Appellant, his assignee, to renew the lease and pay the rents and fines. The difficulty is created by the conduct of the Appellant in confounding the interests by the purchase. He therefore should bear the inconvenience. We rest our claim on the decree of February, 1825.

The covenant to renew runs with the land, and the Appellant cannot be in a better situation than Rawson. Having merged the lease by purchase of the reversion, he has paid no fines or rents, and

therefore cannot charge the Respondents. The under-lease is subsisting only as a security for their benefit, not for his. The point has been decided in *Moody v. Mathews*.* If any right existed, it has been destroyed by merging the interests, which is the act of the Appellant. The effect is the same as in the case of a devisee of land, subject to a mortgage; if he pays off the mortgage without taking an assignment, it is extinguished. So, if a surety pays off a bond, taking no assignment from the obligee, he cannot rank as a specialty creditor.†

For the Appellants, in reply.—If the decree of 1825 was right, the lease was subsisting under the decree of 1814. The property which the assignees had to sell was subject to its fines and fees; after payment of those incumbrances the annuitants were entitled; the assignees could only be entitled to the equity of redemption after the discharge of the incumbrances.

To suppose that there is any merger of interests is a mistake both of law and fact. The purchase was in 1814; the Appellant claims by a deed executed in 1809.

This is not a covenant running with the land; it is a collateral act. If a purchase is made subject to incumbrances, the purchaser becomes liable to indemnify the vender against incumbrances; but it is not so in the case of a purchase under a bankruptcy. *Fry v. Wilkins*.‡ The purchase

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* 7 Ves. 174.

† *Copis v. Middleton*, 1 Turn. and Russ. 224, by Lord Eldon, reversing the judgment of Plumer, M. R., as reported 2 Mad. 410.

‡ 1 Mer. 244.

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having been made in 1809, all difficulty is removed. The lease was in Shannon; he was the party legally entitled to renew; he was a trustee for all the parties interested, to pay the fines and fees on renewal, to discharge the annuities, and account for the trust surplus to Rawson. A subsequent purchase could not vary the right of the parties.

It is argued, that if the characters and interests were distinct, the Appellant could not enforce this claim; but the Respondents seeking equity as plaintiffs must do equity, the case of *Moody v. Mathews* is not in point; the question there was between the incumbrancer and the lessee only.

From the Master's report it appears that nothing has been allowed. The Court has taken the estate and administered the fund, which they must do according to the law administered in equity, that is, according to the trust. The payment, therefore, of the fines and fees, must precede the annuities.

The Respondents are incumbrancers claiming under Rawson. Shannon, the trustee for all parties, was bound to renew, and the payment of the fines and rents was a condition precedent to the renewal. How could there be any merger of the trust outstanding in Shannon? The Respondents in their cases very improperly omit to notice the existence of the trust term. To the past decree we submit; there was no need of appeal from it. We have no objection to the sale of the trust term; but the last decree directs a sale of the lands. The Respondents, the annuitants, by their bill only claimed that interest as Rawson had, and disclaimed all interest in the original lease. The interest of Rawson was subject to the payment of

the renewal fines and rents. The prayer of the bill asks for an account of those fines and rents. To what end or for what purpose but to satisfy them? It is also prayed that the Appellant may grant an underlease upon reasonable terms, pursuant to the covenant. That must be on payment of fines and rent.

The first decree only directs that the trust deed of 1809 should be carried into execution, and the consequent accounts. The sale of the lands was directed by the decree of 1826. The decree should have directed a renewal of the lease to Shannon.

In the course of the argument the following observations were made by

The Lord Chancellor.—No doubt, Rawson was liable on the covenant; he also gives a security, not upon a freehold, but a leasehold interest. If the lease of a house in London, subject to a ground-rent, were given as a security, could the person to whom the security is given object to the payment of the ground-rent?

The Respondents contend, that the Appellant stands in the place and condition of Rawson, and that he is therefore liable to pay the annuities without deducting the rents and fines. But when Rawson pledged the lease as a security for the payment of the annuities, did he do more than transfer the beneficial interest in the lease? The covenant does not run with the land. It was personal to the covenantor.

It is argued that the decree of 1825, as understood by the Master according to his first report, was right; but that on the second reference the Master made a report inconsistent with the decree

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of 1825, and then the Lord Chancellor of Ireland makes a decree according to the second report.

The decree of 1825 declares that the renewal of the lease was for the benefit of the Respondents. If they obtain further security by means of the renewal, can they have that benefit without paying the renewal fines?

The decree of 1825 says nothing about sale of lands. If the subsequent decree means that the Respondents are to have the benefit of the renewed leases without allowing for the fines and rents, is not that inconsistent with the principle of the former decree?

It is the nature of leasehold security to be subject to fines and rent.

If the decree is understood to be for a sale, not of the lands, but the trust term, there is by the trusts an express provision for the fines upon renewal. May it not be said that the payment of the fines and rent was a condition precedent to the renewal?

I will look into the pleadings, the Master's report, and the exceptions, before advising upon the judgment.

If the decree of 1826 is to be reversed, and that of 1825 sent back to be set right, it might be expedient, to save expense, that some direction should be given to restore the Master's report, which was altered upon the exceptions. The substance of the decision would then be to set up the first report.

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The Lord Chancellor.—This case involved matters of considerable difficulty, requiring a minute attention to the nature of the pleadings. The

case turned upon the pleadings in the Court of Chancery in Ireland, from which the appeal is brought. Two annuities of 300*l.* and 200*l.* a year had been granted and secured upon an under-lease of certain leasehold estates in Ireland, from Broughal Newburgh, who held a lease under the Bishop of Kilmore. The under-lease was to be renewed *toties quoties*, that is to say, as often as a renewal of the principal lease should become necessary, so often was there to be a renewal of the under-lease ; and this interest was conveyed to have and to hold to Edward Shannon and his executors, administrators, and assigns ; but upon the trusts therein-after mentioned ; and those trusts explicitly provide that there shall be first of all paid the rent and fines (and other expenses of a nature that do not come at present into dispute,) and then the annuities in question.

The Appellant purchased the right and title of Rawson, who granted the annuities. He therefore came into the place of Rawson ; and the short question which is raised for the decision of this House upon these very complicated pleadings in which it was involved is substantially this, whether or not this security to the annuitants can be made available as a prior incumbrance, or whether or not the rents and the charges and the fines must take the precedence ; the Court of Chancery having substantially, by their decree, and reference back to the Master who dealt with the case, held that the rents and fines were not to be paid until the annuities had been satisfied. That is substantially the question ; but in considering that question it is material that I should not only call the attention of your

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Lordships to the postponement of the annuities by the plain words of the grant until the rents and fines are paid, but to that which very much furthers the argument of the Appellant in this case, the particular nature of the bill calling for relief.

The prayer of the bill was, that the two annuities of 300*l.* and 200*l.* might be deemed and taken and decreed to be a charge upon the several lands and premises in the said therein in part recited indenture of the 22d of June, 1809, mentioned.

These lands were not freehold but leasehold lands. It is perfectly clear, therefore, that a charge upon the land must be subject to the rents and fines, which must be paid in order to preserve and perpetuate that interest, the rents and fines being the first and prior charge. If I grant an annuity or any other security to my creditor, and charge it on a leasehold estate, it is perfectly clear, that substantially, generally speaking, the security he derives, if there is no covenant to the contrary, is a security upon the beneficial interest in the lease; that is to say, that he takes the lease and comes into the shoes of the assignor, and pays the rents and fines, which must be paid in order to give to him the benefit of the security. By a decree of the 15th of February, 1825, following the prayer of the bill, it was ordered, that the different annuitants or their representatives should be entitled to have the lease of the 3d of November, 1791, of the lands of Killan, and also the lease of the 7th of November, 1791, of the lands of Upper and Lower Carnan, "deemed and taken to have been renewed (which they never were — that is an inaccuracy), for the benefit of the

Plaintiffs;" and as a security for the two annuities of 300*l.* and 200*l.* a year, and of the arrears thereof, for the terms respectively of twenty-one years from the date of the last renewal, upon a new lease of the lands and premises obtained by the Defendant Robert Haig from the Lord Bishop of Kilmore. And it was further ordered and decreed, that the trusts of the deed of the 22d of June, 1809—that is, the annuity deed—"should be carried into execution," which would give to Shannon, the Trustee who was to hold for the annuitants under that clause, a right, after the payment of the rents and fines, and charges.

Upon this decree being pronounced, it was referred to the Master to see what sums were due, and to report. The Master, taking the decree as the ground of his inquiry, reported the matter, conformably to the prayer of the bill. To that report exceptions were taken; which upon being argued were allowed; and the reference then made to the Master, it is agreed on all hands was a reversal of the principle on which the Master proceeded. The Master then, according to the new view which he was bound to take, in obedience to the second reference, found that the annuities were the first charge and incumbrance on the lands and premises in the pleadings mentioned, save only the legacy thereafter mentioned to be due to the Defendant Rebecca Rawson, administratrix of Patrick Rawson deceased, and the interest thereof; which legacy the Master reported was a charge on the lands of Monaghanoose and Tilnas Rea only, "that is to say, certain freehold lands in the pleadings mentioned prior to the Plaintiff's claim."

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This report coming back afterwards to the Court of Chancery a general decree was pronounced, containing a finding altogether different from the decree of 1825, and from the view taken in the Master's first report, and letting in the grantees of the annuities as prior incumbrancers, and persons entitled to take the benefit without paying the rents or fines.

I have stated shortly the grounds upon which it appears to me that it is impossible to support this decree. It is very material to observe, that in the second supplemental bill there is an express disclaimer on the part of the Plaintiffs, the present Respondents, of their being entitled to the interest which Broughal Newburgh, that is the original lessee, held of the Bishop of Kilmore in the lands of Killan and Carnan, except on such terms as should be fit and reasonable. It appears that, on the 27th of January, 1824, the Plaintiffs filed an amended supplemental bill against the Defendants to the supplemental bill, praying "that the Plaintiffs might be decreed entitled to the renewal of the two leases of the 3d and 7th of November, 1791, and the covenants for renewal in the same, as a security for the payment of the said two annuities, upon such terms as shall be fit and reasonable." The *Solicitor General* distinctly admitted that this bound his client. It was admitted also by the other parties who appeared by *Mr. Pemberton*, and therefore that all recourse under the liabilities in the first lease rested on these parties.

Now these two decrees, therefore, are perfectly inconsistent with each other. The last decree proceeds on a ground not only unlike, but directly

opposed to the first. The first decree most accurately and most correctly followed, and was a compliance with the only prayer for relief contained in the bill. It is therefore quite clear that these two decrees cannot stand together ; and it appears to me, for the reasons which I have shortly stated, that the first decree was the sound one, that the first decree gave that which alone the annuitants had a right to ask, namely, to come in as incumbrancers, and to take *cum onere* the benefit of the security : that they came in as under-lessees, and under the *toties quoties* clause, having a clear right by that clause to the benefit of renewal to them as under-lessees as often as the mesne lessee obtains his renewal from the Bishop. To that they have a right, and to no more ; they have come into the shoes of the under-lessee by means of their security, which was subject to the payment of the rent and fines. An account of that rent and those fines must therefore be taken and deducted from what they are to receive under the leases granted to Edward Shannon, he being under the deed constituting the securities, the deed of 1809, a trustee for the payment of the annuities after the incumbrances shall have been discharged.

My proposition will be, therefore, that the decree of the 27th of June, 1826, be reversed, and that the decree of the 15th of February, 1825, be altered in one or two material particulars. Much litigation has unhappily arisen in this case from the ambiguity of the expressions of that first decree, which appears to have misled the counsel below. It seems to have misled even the Court which pronounced that decree, and it cer-

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tainly has misled those who have litigated here, and probably has gone far in promoting the litigation which has taken place. There is no doubt, when you come to examine it, what the real meaning of the decree was, and that the Appellant, of that decree, if rightly construed, had no reason or interest to complain. He brought it under review by appeal, rather, I apprehend, on account of its ambiguity and defects, than that, rightly understood, it affected his interest. It follows the prayer of the bill, and gives the grantee in the deed of June, 1809, that to which alone he was entitled. In order to remove the ambiguity of that decree, inasmuch as the leases are said to have expired, and there has been no renewal, and inasmuch as the prayer of the bill is for the renewal of leases under the *toties quoties* clause, I should propose, after the words, “deemed and taken to have been” “renewed for the benefit of the said plaintiffs, “and as a security for the two annuities of 300*l.* “and 200*l.* a year, and of the arrears thereof, for “the terms respectively of twenty-one years from “the date of the last renewal,” to add this clause: “And if they shall not have been renewed, that “the said leases be renewed to Edward Shannon,” (that is the way in which it ought to be done, he being the trustee, under the deed of June, 1809,) “upon the trusts of the deed of the 22d of June, “1809, in the pleadings mentioned:—“And it “is hereby further ordered and declared, that “the trusts of the said deed be carried into full “and effectual execution.” I should also have proposed to refer it to the Master to carry them into execution, which would have given rise to a tedious and expensive operation in the Mas-

ter's office ; but the parties have agreed to what I threw out for their consideration, in order to save this delay and expense. The decree of 1826 being reversed, and the decree of 1825 standing upon the reversal of that of 1826, implying also a reversal of the second reference to the Master under the decree of 1826, according to the principle of that decree upon which he altered his last report, it would have become absolutely necessary that the whole operation of taking the accounts should be gone through once more, at a very considerable expense to the parties, both of time and money. I therefore took leave to ask the learned counsel on both sides, whether, if I should be of opinion, on further consideration of these points on which the court decided, that the decree of 1826 ought to be reversed, and the decree of 1825 set up, they would have any objection to bind themselves by their consent, (without which it could not be done,) to allow the first report of the Master to be restored. No objection to that report being sustainable, that point being established, they at once agreed to this, which was evidently a proposition very beneficial to all parties ; and I have the satisfaction of proposing to your Lordships the putting an end to this long litigation by reversing, the decree of 1826, and setting up the decree of 1825, with this addition, that the orders allowing exceptions to the second report should be reversed, with the consent of all parties, and with the like consent of all parties, that the first report be confirmed. This will put an end to this litigation in the only way in which it is possible to satisfy justice.

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Ordered and adjudged, that the decree of the 15th of February, 1825, be varied, by striking out thereof all the words from "deemed and taken" down to the word "execution" inclusive, and by inserting in lieu thereof the words following, that is to say,—“if they have already been renewed, to have been renewed for the benefit of the said Plaintiffs; and as a security for the two annuities of 300*l.* and 200*l.* a-year, and of the arrears thereof for the terms respectively of twenty-one years, from the date of the last renewal or new lease of said lands and premises obtained by the said Defendant, Robert Haig, from the Lord Bishop of Kilmore; and if the same have not already been reversed, then that the said leases be renewed to Edward Shannon upon the trusts of the deed of the 22d of February, 1809;” and by adding after the words “prior to the Plaintiff’s said annuities” the words following, that is to say,—“and in taking such account declare, that the arrears of rent, renewal fines, and quinquennial fines payable under the said leases of the 3d and 7th of November, 1791, are charges upon the said lands and premises prior to the Plaintiff’s said annuities:” And it is further ordered, adjudged, and decreed, that the trusts of the deed of the 22d of June, 1809, be carried into full and effectual execution; and it is by consent of all parties further ordered and adjudged, that the decretal order, bearing date the 1st of March, 1826, whereby, &c., be and the same is hereby discharged: And it is further ordered and adjudged, that the decree, bearing date the 27th of June, 1826, be and the same is hereby reversed: And it is further ordered, that the cause be remitted back to the Court of Chancery in Ireland, to proceed as the justice of the case may require consistently with the declarations herein contained.

ENGLAND.

(COURT OF CHANCERY.)

ALEXANDER MACDOUGALL - - - *Appellant.***JOHN VINCENT PURRIER** - - - *Respondent.*

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The Act of the 37th Hen. 8., after reciting that divers variances, contentions, and strifes had grown within the city of London, between the parsons, vicars, and curates, and the citizens and inhabitants, touching the payment of tithes, oblations, and other duties, for appeasing whereof, as well the said parsons, vicars, and curates, as the citizens and inhabitants, had compromitted and put themselves to stand to such order and decree touching the premises as should be made by the archbishop of Canterbury and the several other persons therein named, for a final end and conclusion to be had and made touching the premises for ever: it was enacted, that such order and direction as should be made, decreed, and concluded by the archbishop, lords, and knights in the named, or any six of them, before the 1st day of March then next ensuing, concerning the payment of the tithes, oblations, or other duties within the said city or liberties, and enrolled in the King's High Court of Chancery of Record, should stand and remain and be as an Act of Parliament, and should bind, as well all citizens and inhabitants of the city and liberties for the time being, as the said parsons, vicars, curates, and their successors for ever, according to the effect, purport, and intent of the said order and decree so to be made and enrolled.

In a suit instituted by the improprie rector of the parish of St. Helen's, Bishopsgate, against the occupier of a house within the parish, claiming payment by way of composition, as under a decree made in pursuance of the Act, it appeared that at various times, from the date of the Act to the time of filing the bill, decrees and orders had been made in all the courts of Westminster Hall, and in the House of Lords, upon the supposition or presumption that a decree according to the Act had been made and enrolled; but no proof of such enrolment was produced in the cause; and the Defendants to the suit proved that the

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records had been searched, and that no such enrolment was to be found.

Upon these pleadings and evidence an issue was directed in the Court below, to try whether the decree mentioned in and authorized to be made by the statute was duly enrolled according to the provision in the statute.

This order was reversed upon appeal; and it was declared, that if to give effect to the statute it was necessary that the decree should be enrolled, it ought to be presumed that the decree had been duly enrolled.

THE Appellant, on the 24th February, 1824, filed a bill in the Court of Chancery, stating, that on or about the 25th day of March, 1822, the Appellant was lawfully seised and in possession of the rectory impropriate of the parish of St. Helen's, Bishopsgate, in the city of London, with the rights and appurtenances thereto belonging, and was and is lawfully entitled to, and ought to have, receive, and enjoy all the tithes, and rates for tithes, sums of money, and customary payments, and all other dues or duties due and payable to the rector for or in lieu of tithes, which had become due and payable from the inhabitants and citizens of the said parish for all and every their respective houses, shops, warehouses, cellars, and stables, and other buildings and tenements within the said parish.

That by a certain Act of Parliament passed in the 37th year of the reign of King Henry VIII., after noticing and reciting an Act of the 27th of the same King, and an order or decree relating to the payment of tithes and dues in the city of London, and reciting, that since such Act divers variances, contentions, and strifes had then newly risen and grown between the parsons, vicars, and curates,

and the citizens and inhabitants, touching the payment of tithes, oblations, and other duties, by reason of certain words and terms specified in the said order, which were not so plainly and fully set forth as was thought convenient and meet to be; for appeasing whereof, as well the said parsons, vicars, and curates, as the citizens and inhabitants, had compromitted and put themselves to stand to such order and decree touching the premises as should be made by the Archbishop of Canterbury and the several other persons therein named, for a final end and conclusion to be had and made touching the premises for ever: therefore it was enacted, that such order and direction as should be made, decreed, and concluded by the before-named Archbishop, Lords, and Knights, or any six of them, before the 1st day of March then next ensuing, of, for, or concerning the payment of the tithes, oblations, or other duties within the said city, or liberties of the same, and enrolled in the King's High Court of Chancery of Record, should stand and remain and be as an Act of Parliament, and should bind, as well all citizens and inhabitants of the city and liberties for the time being, as the said parsons, vicars, curates, and their successors for ever, according to the effect, purport, and intent of the said order and decree so to be made and enrolled. That in pursuance of the said Act of Parliament, the Right Reverend Father in God, Thomas, then Archbishop of Canterbury, and certain other persons, being a sufficient number of the persons in the said Act named, did, on or about the 24th day of February in the year of our Lord 1545, duly make their decree touching the matters aforesaid, whereby it was ordered and

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decreed that the citizens or inhabitants of the city of London, and the liberties of the same for the time being, should yearly, without fraud or covin, for ever pay their tithes to the parsons, vicars, and curates of the said city, and their successors for the time being, after the rate therein and herein-after mentioned ; (that is to say,) of every 10s. rent by the year of all and every house and houses, shops, warehouses, cellars, stables, and every of them within the said city and liberty of the same, 16½d.; and of every 20s. rent by the year of all and every such house and houses, shops, warehouses, cellars, and stables, and every of them within the said city and liberties, 2s. 9d.; and so above the rent of 20s. by the year, ascending from 10s. to 10s. according to the rate aforesaid: And further, that where any lease was or should be made of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, by fraud or covin, reserving less rent than had been accustomed, or was, or that any such lease should be made without any rent reserved upon the same, by reason of any fine or income paid beforehand, or by any other fraud or covin, then and in every such case the tenant or farmer, tenants or farmers thereof, should pay for his or their tithes of the same after the rate aforesaid, according to the quantity of such rent or rents as the same house or houses, shops, warehouses, cellars, or stables, or any of them, were last letten for, without fraud or covin, before the making of such lease: And further, that every owner or owners, inheritor or inheritors, of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, within the said city and

liberties, inhabiting or occupying the same himself or themselves, should pay after such rate or tithes as is above said, after the quantity of such yearly rent as the same was last letten for, without fraud or covin: And further, if any person or persons had taken or thereafter should take any mease or mansion-place by lease, and the taker or takers thereof, his or their executors or assigns, did or should inhabit in any part thereof, and had, or had within eight years then last past before the said order, or thereafter would or should let out the residue of the same, then and in such cases the principal farmer or farmers, or first taker or takers thereof, his or their executors or assigns, should pay his or their tithes after the rate aforesaid according to his or their quantity therein, and that his or their executors, assignee, or assigns, should pay his or their tithes after the rate above said, according to the quantity of their rent by the year; and that if any person or persons had or should take divers mansion-houses, shops, warehouses, cellars, or stables in one lease, and let or should let out one or more of the said houses, and had kept one or more in his or their own hands, and inhabit in the same, that then the said taker or takers, and his or their executors or assigns, should pay his or their tithes after the rate above said, according to the quantity of the yearly rent of such mansion-house or houses retained in his or their hands, and that his assignee or assigns of the residue of the said mansion-house or houses should pay his or their tithes after the rate aforesaid, according to the quantity of their yearly rents: And further, if such farmer or farmers, or his or their assignees, of any mansion-house or houses, warehouses, shops, cellars, or stables, had

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at any time within eight years then last past, or should thereafter let over all the said mansion-house or houses contained in his or their lease to one person or to divers persons, that then the inhabitants, lessees, or occupiers of them, and every of them, should pay their tithes after the rate of such rents as the inhabitants, lessees, or occupiers, and their assignee or assignees, had been or should be charged withal, without fraud or covin: And further, if any dwelling-house within eight years then last past was or should be thereafter converted into a warehouse or store-house, or such like, or if a warehouse, store-house, or such like, within the said eight years, was or should thereafter be converted into a dwelling-house, that then the occupiers should pay tithes for the same after the rate above declared of mansion-house rents: And further, that every principal house or houses, with quay or wharf belonging to the same, should pay after the like rate of their rents as aforesaid, the third penny abated; and that other wharfs belonging to houses having no crane or gibbet should pay for his tithes as should be paid for mansion-houses in form aforesaid: And further, that where any mansion-house, with a shop, stable, warehouse, wharf, with crane, timber-yard, tenter-yard, or garden belonging to the same, or as parcel of the same, was or should be occupied together, that if the same should be thereafter severed and divided, or at any time within eight years then last past were severed and divided, that then the farmer or farmers, occupier or occupiers thereof, should pay such tithes as is above said for such shops, stables, warehouses, wharfs, with crane, timber-yard, tenter-yard, or garden aforesaid, so severed and

divided, after the rate of their several rents thereupon reserved : And further, that the said citizens and inhabitants should pay their tithes quarterly, that is to say, at the Feast of Easter, the Nativity of St. John the Baptist, the Feast of St. Michael the Archangel, and the Nativity of our Lord, by even portions : And further, that every householder paying 10s. rent and above should, for him or herself, be discharged of their four offering days ; but his wife, children, servants, or others of their family, taking the rights of the Church at Easter, should pay 2*d.* for their four offering days yearly ; and it was thereby provided and decreed, that if any house or houses that then had or thereafter should be let for 10s. rent by the year, or more, be, or had within eight years then last past, or thereafter should be divided and leased into small parcels or members, yielding less yearly rent than 10s. by the year, that then the owner or owners, if he or they dwell in any part of such house, or else the principal lessee or lessees, if the owner or owners do not dwell in some part of the same, should thenceforth pay for his or their tithes after such rate of rent as the same house was accustomed to be let for before such division or dividing into parts or members, and the underfarmer or farmers, lessee or lessees, to be discharged of all tithes for such small parcels, parts, or members rented at less yearly rent than 10s. by the year, without fraud or covin, paying 2*d.* yearly for four offering days : And it was thereby provided that the decree should not extend to houses of great men, or noblemen or noblewomen, kept in their own hands, and not letten for any rent which in times past had paid no tithes, so long as they should so continue unletten, nor to

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any halls of crafts or companies so long as they should be kept unletten, so that the said halls in times past had not used to pay any tithes : And it was thereby decreed, that where less sum than after 16½*d.* in the 10*s.* rent, or less sum than 2*s.* 9*d.* in the 20*s.* rent, had been accustomed to be paid for tithes, that then in such cases the said citizens and inhabitants should pay but only after such rate as had been accustomed : And it was thereby also provided and decreed, that if any person or persons should take any tenement for a less rent than it was accustomed to be letten for, by reason of great ruin or decay, burning, or such like occasions or misfortunes, that then such person or persons, his executors or assigns, should pay tithes only after the rate of the rent reserved in his or their lease, and none otherwise, as long as the same lease should endure.

The bill further stated, that the decree was sometime after the making thereof, or must at this distance of time, and after the same had been since the making thereof acted upon, be presumed to have been duly enrolled in the Court of Chancery ; for the bill stated, that ever since the passing and making of the said last-mentioned Act of Parliament and decree, the same, or the directions of the said decree, had been observed and obeyed by the citizens and inhabitants of the said city of London, and in particular by the inhabitants and occupiers of houses and tenements within the said rectory and parish of St. Helen's, Bishopsgate, aforesaid, or the titheable places thereof ; and that the said citizens and inhabitants of the city of London had, conformably thereto or in pursuance thereof, paid their tithes at or after the rate in the said decree mentioned, except

in those cases in which such citizens, inhabitants, or occupiers were thereby specially declared to be exempted, or liable to a different sum or rate in respect of tithes, or in cases where, by agreement, a less sum than 2s. 9d. in the pound has been accepted and paid. The bill then stated, that by virtue of the Act of Parliament and the decree the rector for the time being of the parish of St. Helen's became and was, and that the Appellant as such present rector then was entitled to receive and be paid all money due and payable for and in respect of the tithes, oblations, and dues arising and payable by the inhabitants and occupiers of houses, shops, warehouses, cellars, stables, edifices, buildings, wharfs, and quays within the said parish of St. Helen's, Bishopsgate, at and after the rates expressed and directed to be paid in and by the said decree; (that is to say,) for every 10s. rent by the year of all houses, shops, warehouses, cellars, and stables within the said parish, 16½d., and for every 20s. rent by the year of all houses, shops, warehouses, cellars, and stables within the said parish, 2s. 9d., subject, however, to certain particular abatements in the said decree mentioned and specified, and particularly to an abatement of every third penny respectively, as to certain principal houses with quay and wharf, having any crane or gibbet belonging to the same, situate within the said parish.

The bill then proceeded to state that the Respondent John Vincent Purrier had, since the 25th of March, 1822, up to and until the 25th day of March then last past, been in the possession or occupation of a messuage or dwelling-house, hereditaments and premises, situate at a place now called St. Helen's Place, within the said rectory and parish, at and under a certain yearly rent, or reservation in the nature of

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rent, which had been or was formerly or theretofore, or at some time or times, paid or reserved or made payable for and in respect of the said messuage or dwelling-house, hereditaments, and premises, or of some other houses, edifices, or buildings, which formerly or theretofore were erected and stood upon the site of the said messuages or dwelling-houses, hereditaments, and premises then in the possession, occupation, or holding of the said Respondent, or upon the same piece or parcel of land or ground on which the said messuage or dwelling-house, hereditaments, and premises had been since erected or built, or then stood, and therefore during the time the said messuage or dwelling-house, hereditaments, and premises were in such occupation or possession of the said Respondent, the tithes, or payments in lieu of tithes, were and the same then were payable by him to the Appellant as such impropriate rector of the said parish of St. Helen's, Bishopsgate, as aforesaid, for and in respect of the said messuage or dwelling-house, hereditaments, and premises, in manner directed by the said decree, and in proportion to the rent then paid or payable for the same, or the payment made in the nature or in lieu of rent for the same during such time. The bill further stated that the Respondent had himself, and all former owners and occupiers of the messuage or premises then occupied by him or the messuages erected and built upon the site thereof, and upon the piece or parcel of land or ground on which the same messuage and premises had been since erected and built and then stood, always, or at various times since the said last-mentioned Act of Parliament and decree were made, and conformably to or in pursuance

and by virtue thereof, paid to the former rectors for the time being tithes or tithe rate for the said messuages and premises, at the rate in the said decree and therein-before mentioned, or at some less rate, either by agreement or by the indulgence of such rector, in discharge and satisfaction of and for the tithe or rate in the said decree mentioned ; and that the sums of money accrued and become due and payable for or on account of the said tithe or dues of or in respect of the said messuage or dwelling-house, hereditaments, and premises in the occupation or possession of the said Respondent had not, nor had any part thereof since Lady-day, 1822, been paid to the said Appellant, or to any person by his order, or to his use, and there was then a sum of money in respect of seven quarterly payments of tithes of the said messuage or dwelling-house, hereditaments, and premises due and owing to the said Appellant by the said Respondent ; that the Appellant had applied to the said Respondent, and requested him to account for and to pay to the Appellant the money due to him in respect of the said tithes or dues, and requested him to disclose the yearly and other rents paid by him the said Respondent for the messuage or dwelling-house, hereditaments and premises, which then were, or since March 25th, 1822, had been in possession, occupation, or holding of him the said Respondent ; and in case no rent was paid or payable by him the Respondent for or in respect of the said premises, then to set forth and discover at and under what yearly and other rents the same were, and when last possessed and occupied, and to account to the Appellant for and pay to him what was justly due from the Respondent for such

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tithe and dues, but that the Respondent had refused so to do.

The bill charged (amongst other things) that the tithes or dues were payable, and that the amount of the several sums to be paid by the Respondent ought to be calculated and computed after the rate and in manner directed by the said decree, according and in proportion to the present improved or last known rent or rents or value of the said messuage or dwelling-house, hereditaments, and premises, and not otherwise or in any other manner: And the bill further charged, that there was not and were not any customary or prescriptive sum or sums of money due and payable for the said messuage, dwelling-house, hereditaments, and premises, other than and according to the rate in the said decree mentioned. The bill further charged, that the Respondent previously to the 25th of March, 1822, and that the former occupiers of the messuage or dwelling-house, hereditaments, and premises then in the occupation of the said Respondent, always or at many times since the passing of the said Act of Parliament and making the said decree, and in pursuance thereof, rendered and paid to the rector for the time being of the said parish of Saint Helen, Bishopsgate, tithes or tithe dues, calculated at 2s. 9d. in the pound, on the then yearly rent of the said messuage or dwelling-house, hereditaments, and premises, or made or paid a compensation for the same. The bill alleged that the Respondent pretended that the decree never was enrolled, and was therefore not binding on him or any of the citizens and inhabitants of the city of London, and that the decree never had been confirmed or recognized as law in

any court of justice, and had never been enforced, acted upon, and complied with in any manner whatever ; whereas the Appellant charged that the decree was duly enrolled, and that by some accident which could not, at this distance of nearly three hundred years, be accounted for or ascertained, the said original decree and the enrolment thereof had been destroyed or lost, and the said original decree or the enrolment thereof could not then be found or produced.

The Appellant further charged, that the Act of Parliament and decree had at all times since the making thereof been accepted, recognized, enforced, and acted upon as the established and existing law and custom relating to tithes, or dues relating thereto, to be paid by the citizens of London, and by persons holding or occupying houses, messuages, and premises within the said city and its liberties, and in particular in the said parish of St. Helen, Bishopsgate ; and that ever since the making and passing the said Act of Parliament and decree the same had, and then had, the force and effect of an Act of Parliament, and that the said Respondent ought to pay his tithes accordingly.

The bill further charged, that the Act of Parliament and decree were, at some short time after the making of the decree, duly entered and copied in a register book kept by Bonner, then Bishop of London, wherein the rights and property, affairs and transactions, of and relating to the see of London, and the deeds and papers relating thereto from the year 1539 to the year 1559, were registered, and which book was then deposited and preserved in the Cathedral Church of St. Paul in the city of London ; and that it appeared by the copy of an indorsement on the decree copied and

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entered in the same book, and that the fact was, that the decree, duly signed and sealed by the persons who made the same, was on the 25th day of the said month of February, 1545, delivered to Bishop Bonner by the Archbishop and the other persons who made the same, and that the Bishop on the 25th day of February, 1545, delivered the said decree to his registrar for safe custody, and that the same was accordingly so kept and preserved.

The bill further charged, that the Bishop, as the head and superintendent of the clergy of the city of London, was the proper person to have the custody of the decree; and that the decree had been constantly printed by the King's printers along with the existing statutes of this realm, and as forming part of the said Act of Henry VIII., and as having been duly made in pursuance of the said Act; and that the decree had been uniformly received and acted upon in the courts of justice in this kingdom, and considered by the King's Judges in all times since the making thereof as a valid and existing decree, and as having been duly made and enrolled, and as having the force and effect of an Act of Parliament; and that many decrees and orders of the King's court of justice had been made and founded on, pursuant to the said Act of Parliament and decree; and that the citizens and inhabitants of the city of London had been ordered, decreed, and adjudged to pay their tithes at and after the rate of 2s. 9d. in the pound, calculated on the yearly rate and value of the houses and premises in their occupation respectively, according to the decree and the true intent and meaning thereof; and that the citizens and inhabitants of the city of London had paid their tithes accordingly pursuant thereto, except in certain parishes within

the liberty of the said city, which were exempted by Act of Parliament after the fire of London.

The Appellant further charged, that, except by force of the said Act of Henry VIII. and decree, the clergy of London had not received and were not entitled to receive any tithes or any payment in respect of tithes : And the bill further charged, that a prior Act of the 27th year of King Henry VIII., relating to the tithes in the city of London, had been held to have been repealed by the said Act of the 37th of Henry VIII. ; and that the said Act of the 27th of Henry VIII. had never, since the passing of the said Act of the 37th of Henry VIII. and the making the said decree, been in any manner acted on or observed, and been deemed, taken, or considered to be a valid and subsisting Act, as it would have been in case the said decree had not been duly made and enrolled.

The Appellant further charged and insisted that it was not necessary at that distance of time to produce or prove the actual enrolment of the said decree, but that such enrolment ought to be presumed ; and if the same were not actually enrolled, yet the said decree, having been so recognized, acted upon, adopted, and received, ought to be treated and considered of the same force and effect as if the actual enrolment were extant and produced : And the bill charged, that the Respondent had in his possession or power books, accounts, and documents by which the matters in the bill might appear, but which he refused to produce.

The bill therefore prayed that an account might be taken, under the direction and decree of the Court, of all sums of money due and owing to the Appellant from the Respondent for or in respect

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of the said tithes or dues on account of the messuage or dwelling-house, hereditaments, and premises, held or occupied by the Respondent within the said rectory or parish, or the titheable places thereof, from and since the 25th of March, 1822, after the rate of 2s. 9d. in the pound of the present rent or value of the said dwelling-house and premises, or at such other rate as the Appellant should be found to be justly entitled to ; and that the Respondent might be decreed to pay to the Appellant what, on the taking of the said account, should be found to be justly due to the Appellant for or in respect of such tithes, the Appellant waiving penalties in the usual manner.

To this bill the Respondent filed his answer on the 17th of March, 1825, by which he stated that the Appellant was not, to his belief, seised of or entitled to the rectory impropriate of the parish of St. Helen, nor entitled to any of the rights thereunto belonging, nor entitled to the tithes or other dues claimed in the bill, inasmuch as the Respondent said, he was informed and believed that the said church was not at any time appropriated to any religious house or body ; and as evidence thereof he said, he was informed and believed that an ancient convention touching the said church had been entered into many centuries ago, to the following effect, as translated from the Latin ; (that is to say,) “ This is the convention between the “ Chapter of St. Paul’s and Ranulph and Robert “ his son ; that Ranulph and Robert grant to the “ Canons of St. Paul the church of St. Helen for “ their joint lives, to render yearly 12d. ; but upon “ their deaths any third person of their kindred “ whom they shall choose shall hold the aforesaid

“ church, rendering *2s. per annum* to the same
 “ brothers; but such third person being also
 “ deceased, the same church shall remain to the
 “ Canons, discharged of all incumbrances, quietly
 “ and free.”

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The Respondent further said, he was informed and believed that in the year 1181 the Canons of St. Paul's were rectors of the church of St. Helen; and that the said church paid 12*d.* for synodals and 12*d.* for diaconals; and that a great many years ago, when one Alured was Dean of St. Paul's, another convention or agreement was made between the then Dean and Chapter of St. Paul's and William the son of William the goldsmith, patron of the church of St. Helen's, and the Prioress and Nuns of the late priory of St. Helen's, to the following effect :
 “ Know all men by these presents, that I, Alured,
 “ Dean of St. Paul, and the Chapter of the said
 “ church, have granted to William the son of
 “ William the goldsmith, the patron of the church
 “ of St. Helen's, London, that he may constitute
 “ in the same church nuns there for ever to serve
 “ God, and that he may confer the right and
 “ patronage of the said church which was granted
 “ to him by our predecessors to the nunnery
 “ established there; but it should be confirmed to
 “ the nunnery in such manner, that whoever shall
 “ administer there under the appointment of the
 “ prioress, after her election shall have been made
 “ by the said collegiate body of nuns, he may be
 “ presented to the Dean and Chapter, as well for
 “ the aforesaid church itself, also for the payment
 “ of half a mark annually within eight days of
 “ Easter, and for the nonalienation of the right

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“ of patronage, and for the nonsubjecting them-
 “ selves to the jurisdiction of any other collegiate
 “ body ; we grant also, as far as we have the
 “ power, that the nunnery there established may
 “ convert to their own use all the obventions of
 “ the above-mentioned church, except the afore-
 “ said pension ; also, that the said Nunnery shall
 “ bear all episcopal burthens belonging to the said
 “ church ; but if in the place aforesaid, by some
 “ unforeseen event, there could cease to be the
 “ present abode and establishment of nuns, we
 “ have granted, that the religious men shall be
 “ there established without any let or hindrance,
 “ according to the manner which has been above
 “ expressed concerning the establishment of the
 “ nuns, and that they may be held bound in a
 “ similar manner to the Dean and Chapter of
 “ St. Paul’s.”

The Respondent by his answer further stated, that he was informed and believed that the Dean and Chapter of the Cathedral Church of St. Paul’s then and for many centuries had the right of patronage and advowson of the said church, or if the same should have been legally appropriated to the vicarage thereof, and if it should be established that the said church had been duly appropriated, or that a vicarage had been fully endowed, the Respondent said, that inasmuch as he was advised that the rectors of all parishes in which vicarages were endowed were of common right entitled to the advowson of such vicarages, he submitted to the judgment of the Court, that the Dean and Chapter of St. Paul’s were such rectors ; and he alleged that the Rev. James Blenckaine

was, on the 22d of March, 1822, and had ever since been, the minister or incumbent of the said parish, and had officiated in the cure of souls, and was then commonly called the vicar of the said parish of St. Helen's, and that the said James Blencairne paid the sum of half a mark, or 6s. 8d. to the Dean and Chapter of St. Paul's.

The Respondent by his answer further stated, that James Blencairne was entitled to a suitable income as the incumbent, and that he did not receive on an average for three years prior to July, 1822, (exclusive of monies for sermons and voluntary gifts or offerings from the parishioners,) more than from 15*l.* or 20*l.* a year; that the parishioners had proposed, in the year 1822 and 1823, to give the sum of 100*l.* a year, to be raised by a rate, and that he, the Respondent, acquiesced in such arrangement, and paid his share of the said sum of 100*l.*, and 100*l.* for the two years ending Easter or July, 1823; and the Respondent insisted that James Blencairne received such several sums in lieu of all dues to which he, as the ecclesiastical parson or vicar of the said parish, was entitled; and that the Appellant, being a layman, (even if he was rector of the said parish,) was not on the 25th of March, 1822, or at any time since, entitled to any Easter or other offerings, or ecclesiastical dues, payable *ratione altaris* of the said church of St. Helen's aforesaid; and the Respondent said, he was informed and believed that the Appellant had no seizin of the church or the chancel of the church, nor any glebe in the parish, and was not liable to the repairs of the chancel; for the Respondent said, he was informed that other persons claimed to receive certain cus-

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tomary payments in lieu of tithes in the said parish; not as the Appellant's agent or collector, but in their own right.

The Respondent denied that the Appellant was entitled to receive or enjoy the tithes, rates for tithes, or customary payments alleged by the bill to be due and payable by the citizens and inhabitants of their respective houses and premises within the parish, according to the Act of Parliament in the bill mentioned; but whether the Appellant was or not entitled to any of the customary payments payable in the parish he did not know.

The Respondent said, he had been informed and believed that the Act of Parliament of the 37th year of the reign of Henry VIII. had been made, but he did not know, and could not set forth as to his belief or otherwise, whether such decree as in the said bill mentioned was made pursuant to the said Act of Parliament, save as he had heard statements made in relation to such a decree having been made, but how far such statements were accurate he was unable to set forth; however, he said, that according to the best of the information he had been able to obtain on the subject, such decree, if ever made, was not duly or otherwise enrolled in this Court of Record; and that after diligent search had been made for the same, no decree to such purport or effect could be found enrolled in the King's Court of Chancery.

The Respondent submitted, that the enrolment of record in the High Court of Chancery of the decree or order contemplated by the said Act was provided in order to prevent any surreptitious order or decree being imposed upon the citizens

and inhabitants of London under and by virtue of the said Act, by reason that the laws of the land and usages of the said court required, that before any such decree could be enrolled, the same being to be an instrument under the hand and seal of certain subjects of his then Majesty, the signature and seal of one at least of the parties signing and sealing the said contemplated decree would be by such laws and usages required to be acknowledged and proved before the Master of the Rolls or one of the Masters of the said Court ; and that such decree being an instrument to be under the hand and seal of subjects would, had it been enrolled pursuant to the said Act, then be enrolled on certain rolls or enrolments of the said Court called the close rolls of the Chancery, which, from the time of their commencement to the present time, were kept in the Tower of London or in the Rolls Chapel ; and which rolls were, as the Respondent was informed and believed, then extant, uncanceled, and undefaced in their regular order and series from the time of their commencement to this time ; and an inventory and index to the said Rolls, coeval with the same, and containing the parties names and description of every instrument there enrolled, were also, as the Respondent was informed and believed, then extant, uncanceled, and undefaced, and in regular order and series ; and he therefore submitted and insisted, that such alleged decree could not be presumed to have been enrolled, and the enrolment lost or destroyed ; and he submitted, that inasmuch as such decree had not been enrolled, this Court would not presume, entirely contrary to the fact, that it had been enrolled.

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The Respondent by his answer further said, he did not believe that since the making of said alleged decree, or during any part of the time since the said Act, the directions of the said alleged decree had been observed and obeyed by the citizens and inhabitants of the said city of London, although he said he had heard that in some few instances such a decree had been insisted on of late years as a binding decree; but he denied, to the best of his knowledge and belief, that the inhabitants of the parish of St. Helen's had, in conformity to and in pursuance of the said alleged decree, paid their tithes at and after the rate therein mentioned, except as the said alleged decree, or any other payment in lieu of tithes, as therein-after mentioned, and in the schedule thereto annexed, set forth.

The Respondent stated, that in case the said decree had been duly enrolled and was binding, the same would not have been submitted to, nor have been applicable to nor binding on the said parish of St. Helen's; for he said, it appeared, by the said Act and alleged decree, that the same was meant to apply to parishes of which only one person as parson, vicar, or curate had the cure of souls, and was entitled to all the tithes, oblations, and other dues, and therefore the parishes wherein all the tithes and oblations, obventions, offerings, and altarages were the property of the parson or vicar or other person having the cure of souls, which was not the case, as the Respondent believed, in the said parish, if the said rectory had been appropriated.

The Respondent said, he commenced tenant of a certain messuage, situate at No. 14, St. Helen's Gate, Bishopsgate-street, and an area and yard

thereunto belonging, on the 25th of March, 1822, at the yearly rent of 130*l.*, and that at the time of filing the said bill he continued tenant at that rent. He said, that no rent or reservation in the way of rent was formerly paid or reserved in respect of the said messuage or area, or of or in respect of any other houses, edifices, or buildings alleged by the said bill to have been formerly erected and standing on the site of the said messuage or dwelling-house; because Respondent said, he was informed and believed that no messuage or dwelling-house or other building was ever before built or standing upon the site of the said messuage prior to the year 1822, and that the site of ground or soil on which the said messuage was built, and of which the area and yard thereof was composed, was formerly a court, garden, curtilage, close, or inclosure, parcel of the glebe of the church of St. Helen's, or otherwise was parcel of the possessions of the said prioress and nuns who built the said church, who, if the same was duly appropriated, were the rectors of the said church, and the piece or parcel of land on which the said Respondent's house was built was, as he was informed and believed, in the hands and manurance of the said prioress and nuns at the time of the dissolution of the said priory, which was a greater priory, and dissolved by the Act of the 31st of Henry VIII.; and the same ground or soil there would be, by reason of the unity of possession, and ever since the said Act of the 37th of Henry VIII. until the building of the same, exempt or discharged from the payment of tithes, or composition or rates in lieu of tithes.

The Respondent further stated, that the said site of land so exempt and exempted from the

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payment of tithes, as he was informed and believed, was granted and conveyed in fee to some lay person and his heirs by some former King or Queen of England ; and by divers mesne conveyances and assurances, the same, together with the adjoining land and the site of the said priory, did, in the reign of King Edward VI. or Queen Elizabeth, become vested in the leather-sellers company or some other person, for or subject to certain charitable uses or trusts, with a condition that in case of any breach of the trusts the said premises should vest in the mayor and commonalty of the city of London, subject to the said charitable uses or trusts. And he believed that the deeds and muniments which would prove the exemption from tithes were in the hands of the said warden and company of leather-sellers ; that he had applied for, but could not obtain the same, and was therefore unable to set forth more particularly how he made out that the said premises were always lawfully exempt from the demand of the Appellant and all other persons for or in respect of the payment of any tithes.

The Respondent denied that to his knowledge and belief, during the time the said messuage or dwelling-house and premises had been in his occupation, the tithes, or yearly payment in lieu of tithes, were payable by him to the Appellant, as such impropriate rector of the parish of St. Helen, Bishopsgate, for or in respect of the said messuage or premises in the said alleged decree mentioned, or otherwise, or that the same were payable by the Respondent in proportion to the rent. And he denied that he had at any time, or that any former owner or occupier had, to the best of his knowledge and belief, always or at any times or time (save as

therein appeared) since the said alleged decree, and conformably to and in pursuance and by virtue thereof, paid to the former rector or pretended rector of the said parish any tithes or payment for the said messuage and premises at the rate in the said alleged decree mentioned, or at any less rent or proportion. However, the Respondent said he had been informed and believed that a Mr. Borrodaile, who occupied the said premises in 1821, or some prior years or year, did pay some sums or sum of money to the Rev. Mr. Cooke, who called himself rector of the said parish, he having demanded the same, and, as the Respondent had been informed and believed, threatened (if the same was not paid) to file a bill in Chancery to recover 2s. 9d. in the pound on the rack-rent of the said house; and the Respondent believed that the said Mr. Cooke did actually file a bill in equity against an inhabitant of the said parish of the name of Cooper, for the tithe of his house, after the rate claimed by the said Appellant's bill; but the Respondent said he was informed and believed that the said bill was dismissed with costs, and he believed that the said Mr. Cooke did by similar means induce some other parishioners of the said parish to pay sums of money for tithe of their houses not anciently or legally due for the same.

The Respondent admitted that, under the circumstances in his answer stated, he had not made to the Appellant any payment for or on account of the messuage or premises in his the Respondent's occupation, and he believed there were not any payments due to the Appellant on account thereof; however, he said he had been informed and believed, that before the filing the

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Appellant's bill of complaint, a person, who stated himself to be agent to the Appellant, did demand of the Respondent's partners or clerks at the counting-house in St. Helen's Place some sum of money (he believed ten guineas) as for a year's tithes of the said messuage and premises: And the Respondent said, he was informed and believed that such person was told by the Respondent's partners or clerk, that if such person would state such demand to the Respondent's legal adviser (whose address was given), and produce the title of the said Appellant to demand the same, and such legal adviser was of opinion the demand was lawful, the demand would be immediately paid.

The Respondent further said, he believed that the parish consisted of 115 dwelling-houses or thereabouts, and in the year 1814 consisted of 112 dwelling-houses or thereabouts, exclusive of the messuages situate in Crosby-square in the said parish; and he said, he was informed and believed that the several sums of money, or customary payments in lieu of tithes therein-after mentioned, were only legally due and payable in the said parish for and in lieu of all tithes arising in the said parish, and that a list or rental of the several persons liable to pay tithes in the said parish, and the sums payable by them, appeared to have been by an order of vestry of the said parish, in or about the year 1814, made out and written on parchment, and hung up in the vestry, with a view to perpetuate the evidence thereof; and that he had, in a schedule to the said answer, set forth a copy thereof, and which customary payments were a payment in the aggregate

amounting to the same sum, as he was informed and believed, was at the passing of the statute of the 37th of Henry VIII., and ever since had been payable to the person or persons then and now being rector or rectors of the said parish, or the vicars thereof, or the person or persons lawfully entitled to the sums of money mentioned in the said table or rental, in lieu of all tithes arising in the said parish from the persons now occupying the sites of the houses and premises then in the occupation of the several persons in the said rental named, except such of the said payments as had since been lawfully released or conveyed, by the person or persons having title thereto, to the owner of the said messuages and tenements.

The Respondent said, he believed that the ecclesiastical person having the cure of souls was, in the 37th year of the reign of Henry VIII., and had ever since been, and that the said Rev. James Blencairne then was as such entitled to all oblations, obventions, altarages, Easter offerings, and all other ecclesiastical dues payable in the said parish by the inhabitants and occupiers of houses; and the Respondent submitted, that such customary payments covered or protected all messuages within the said parish, whether built at the time of or subsequent to the said Act of Parliament; and, except as aforesaid, he did not know of any customary payment or payments for or in lieu of tithes or dues in respect of the messuages or premises in the said parish.

The Respondent said, that (save as in his said answer appeared) he did not believe that previous to the 25th of March, 1821, any former owner or occupier of the said messuage and premises

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at any time since the passing of the said Act of Parliament, and making the said alleged decree, and in pursuance thereof, did render and pay to the impropriate rector or rectors for the time being of the said parish any tithes or tithe dues calculated at 2s. 9d. in the pound, or at any other rate on the then yearly rent of the said premises, or make any compensation or satisfaction for the same; and the Respondent said, he believed that the said Act of Parliament and alleged decree had not at all times since making the said alleged decree, or at any times, except in some comparatively recent instances, and then only under the mistaken notion that the same was duly enrolled, been accepted, recognized, enforced, and acted upon as the established and existing law and custom relating to the tithes or dues relative thereto, to be paid and payable by the citizens and by the inhabitants of the city of London, and other persons occupying houses and tenements in the said city and its liberties: And the Respondent denied that the alleged decree had then the force and effect of an Act of Parliament, inasmuch as the authority of the same was, (and he believed very generally,) disputed; and he submitted, that he ought not to pay any tithe or dues according to the said alleged decree.

The Respondent by his answer further stated, that he did not know, nor could he set forth, as to his belief or otherwise, whether the said Act of Parliament and alleged decree, or either of them, were or was or not duly entered or copied in a register, or any other book kept by Bonner, then Bishop of London, or any other person for him; nor whether the affairs and trans-

actions, and deeds and papers, or any of them, of and relating to the see of London, its rights and property, between the years 1539 and 1559, had been registered or preserved in such register or book; nor whether such book was or is deposited and preserved in the cathedral church of St. Paul or any other place; nor whether it did or not appear by the copy of an enrolment on the said decree, copied and entered in the same alleged book; nor whether the fact was, that the said decree was duly signed and sealed by the persons who made the same, was at any time delivered by Bishop Bonner to the Archbishop in the bill mentioned, nor any other persons; nor whether the said Bishop did or not, on the 25th day of February, 1545, or at any other time, deliver the said alleged decree to his registrar or any other person for safe custody; and he said, he did not know whether the said alleged decree had or not been constantly or at any times printed by the King's printer along with the existing statutes of this realm.

The Respondent further said, he admitted that the said Act of the 37th Henry VIII. would have been and then was useless and nugatory unless taken and acted on or in connexion with the said alleged decree, or some other decree made by proper persons and duly enrolled as the Act required; but the Respondent said, he believed that some decree, touching tithes in London, has been acted on in some of the courts of justice in this kingdom, and considered by the King's judges as a valid and subsisting decree, but under a mistaken notion, as the Respondent believed, that the same had been duly enrolled; and he insisted, that unless the Appellant produced the enrolment of

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the record in the Court of Chancery, or proving the same to have been casually lost or destroyed, and produced evidence of its contents to the effect in the said bill set forth, the Appellant could not be permitted to go into or give any secondary evidence of the contents of the decree alleged to have been made pursuant to the Act of the 37th Henry VIII; however, the Respondent said, he did not know, nor could he set forth, as to his belief or otherwise, whether many or any decrees or orders in some or any of the King's courts of justice had been made, founded on or pursuant to the said Act of Parliament and alleged decree; nor whether the citizens and inhabitants of the city of London, or any of them, had been ordered and adjudged to pay their tithes at and after the rate of 2s. 9d. in the pound, or any other rate on the rent or value, according or with reference to the said Act or alleged decree; nor whether the clergy of London had received or (save as aforesaid) were entitled to receive any tithes or payments in respect of tithes, except by force and effect of the said Act and alleged decree.

He said, he believed that a prior Act of the 27th Henry VIII. did pass, relating to tithes in the city of London, but he submitted to the Court whether such Act was or had been held to have been repealed by the said Act of 37th Henry VIII. and the said alleged decree; and he believed that the said Act of the 27th Henry VIII. had been very lately insisted upon by some or one of the clergy of London as a valid and subsisting Act of Parliament, in the event of the said decree not having been duly enrolled; and the Respondent submitted to the judgment of the Court, whether the said Act of

27th Henry VIII. ought not to have been deemed, taken to be, and considered as a valid and subsisting Act, in case the said alleged decree had not in fact been duly made and enrolled; and the Respondent insisted it was necessary, at that distance of time, to produce the actual enrolment of the said decree, which was the only evidence of the existence thereof that could be admitted, so as to bind the Respondent, and that such enrolment ought not to be presumed, inasmuch as such presumption, if made, would be, as the Respondent believed, entirely contrary to the fact; and he said, that under the circumstances therein appearing he submitted and insisted, that even if the said decree had been acted upon, recognized, and adopted, as in the bill alleged, it ought not to be treated and considered as of the same force and effect as if the actual enrolment was extant and produced.

To this answer the Appellant replied, and witnesses were examined on his behalf, but no witnesses were examined nor any evidence given on the part of the Respondent.

The Appellant proved by his witnesses the several deeds and instruments showing his title to the said rectory; and further, that between Lady-day and Michaelmas, 1822, and after he had become the purchaser of the said rectory, the Appellant's agent accompanied the Rev. Edward Cooke, the former rector, in his collection of the tithes and payments in lieu thereof at Lady-day, 1822, and that the Appellant's agent was introduced by the said Edward Cooke to the several residents and occupiers as the person to whom they were in future to pay such tithes or payments.

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The Appellant also proved the actual receipt of him as such rector (through his agent) of such tithes or dues, and that he had since continued to collect and receive such payments ; and he proved by the evidence of Mr. Borradaile, the former owner and occupier of the house and premises then in possession of the Respondent, that he, Mr. Borradaile, had occupied the said premises about four or five years ago, and that he paid a certain sum of money during his occupation to the lay or improper rector of the said parish, or his agent, as tithes, or in lieu of tithes, amounting to about ten or twelve guineas ; and the Appellant further proved by the Reverend H. B. Owen, who had been rector of the parish of St. Olave, Hart-street, in the city of London, for thirty years and upwards, and was then such rector, that he had always considered himself entitled to be paid at the rate of 2s. 9d. in the pound on the rack-rent of houses occupied in his parish, by or in the nature of tithes, under the said statute of 37th Henry VIII.

The same witness proved that the East India Company had for many years past paid, and were then paying to him (the witness) as such rector, 2s. 9d. in the pound on the estimated annual value of the premises occupied by them within the parish, and that the King's Excise Office also made a similar payment to him, and that the New Corn Exchange Company had agreed to make him a similar payment ; and that he had at various times since he became rector of the said parish claimed and received from many other inhabitants living in the said parish 2s. 9d. in the pound on the rack-rent of the respective houses and premises ; and he

mentioned two instances in which some of his parishioners resisted the payment, in consequence of which he caused a bill in equity to be filed against them, upon which they submitted, and paid him such rate accordingly on the rack-rent of their respective houses.

The Appellant, in further support of his case, produced the office copy of the record of the Court of King's Bench in an action at law, *Hallam* against *Adams*, Hil. Ter. 23 Car. I. Roll 1834, brought for false imprisonment under a warrant for not obeying an order of a magistrate for the payment of the small tithes, or money in lieu thereof, within the said parish, and in which the question of enrolment of the said decree was in issue, and a verdict was found for the enrolment.

The Appellant also produced various printed cases of proceedings in suits and actions in the High Court of Chancery, in the Court of King's Bench, in the Court of Common Pleas, in the Court of Exchequer, and in the House of Lords, at various times for upwards of two centuries, in which decrees, judgments, and orders were made for payment of tithes in the city of London, founded on the fact or assumption that the said decree had been duly enrolled. Books of the statutes of the realm were also produced, containing the decree printed at the end of the statute.

The cause was heard before the Master of the Rolls, who by his decree or order bearing date April 29, 1828 (which has been since enrolled), ordered that the parties should proceed to a trial

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in the Court of Common Pleas on the following issue: Whether the decree mentioned in and authorized to be made by the Statute 37th of Henry VIII. c. 12, was duly enrolled according to the provision in that statute, and he reserved the consideration of all further directions, and of the costs of the suit, until after the trial of the issue.*

The appeal was against this order.

* Upon the hearing of the cause, the Respondent, having obtained an order for the purpose, was prepared to give in evidence the pleadings, proofs, and decree in a cause instituted by the Appellant in the Court of Exchequer, in which cause the Appellant was the Plaintiff, as rector impropriate of the parish of St. Helen, Bishopsgate, and the wardens and society of the mystery and art of the leather-sellers of the city of London were the Defendants, which suit was for an account and payment of tithes, according to the statute 37th Henry the Eighth and the decree in question, in respect of the whole or the greater part of the premises to which the present suit relates; it was insisted by the answer filed in that cause, that *the decree had not been enrolled*; and amongst other witnesses who were examined in the cause on the part of the Defendants was Francis Henry Rich, of the King's Remembrancer's Office, gentleman, who deposed, that in or about the month of June, 1826, he made diligent search for an enrolment of the decree in the pleadings mentioned to have been made in pursuance of the Act of Parliament of the 37th year of the reign of Henry the Eighth, in the pleadings mentioned, amongst the records and instruments enrolled in the High Court of Chancery; and that he made such search in the office of the Chapel of the Rolls, in Chancery-lane in the city of London, the place where such decree ought to have been found in case the same had been enrolled in the said court; and that he searched the Parliament Rolls, the Decree or Judgment Rolls, the Patent Rolls, and the Close Rolls, for the 37th and 38th years of the reign of King Henry the Eighth, and also the Calendars or Indices

For the Appellant.—*The Solicitor General, Sir Edward Sugden, (and Mr. Roupell.)**

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There was sufficient evidence to show that the award of the Archbishop of Canterbury and the other persons, or a competent number of them, mentioned in the Act 37th Henry VIII. had actually been made of the tenor and to the effect stated in the Appellant's bill; and although the actual enrolment of the award is not now to be found or

thereof; but that he did not find any enrolment of such decree upon any or either of the above-mentioned Rolls, nor any reference to the same in the Calendars or Indices aforesaid; nor did he discover any trace or note or mark of any such decree or order ever having been enrolled or deposited in the High Court of Chancery of record; and that the said Parliament Rolls contain enrolments of all Acts of Parliament passed in each meeting or session of Parliament; and that the said Patent Rolls comprise the enrolment of instruments and grants under the great seal of England only; and that the Decree or Judgment Rolls contain only, so far as he had observed and believed, the enrolment of all judgments and decrees pronounced in causes depending between the suitors in the said court; and that the said Close Rolls contain enrolments of deeds and instruments under the hands and seals of subjects; and that he was informed by the principal clerk at the Rolls Chapel Office, and believed, that the said Close Rolls were the proper Rolls upon which such an instrument as the said decree ought to have been found; and that he did not believe such decree was enrolled in the High Court of Chancery, pursuant to the said Act of Parliament; and that if the same ever had been enrolled, it would still appear and be found upon one of the aforesaid Rolls, the membranes of the said Parliament Rolls being regularly numbered at the right-hand corner of each membrane, each separate instrument on the said Close Rolls being also regularly numbered, and each judgment or decree likewise being regularly numbered; and he verily believed that the record of enrolment of any instrument could not have been lost, withdrawn, or destroyed, the said

* Since appointed one of the Masters in Chancery.

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accounted for, yet, after a lapse of nearly three hundred years, positive evidence of the formal act and ceremony of enrolment ought to have been and must be presumed.

The presumption of enrolment is, under the circumstances, and after so great a lapse of time, a presumption of law, and not a mere presumption of fact to be found by a jury.

A jury can have no better or other means of

rolls in which he made such search as aforesaid clearly and distinctly showing, by their present state, that they could not have contained any instruments not then appearing therein, inasmuch as the loss, withdrawance, or destruction thereof would have left a chasm or interval in the series, which, as before stated, was perfect, as were likewise the Calendars or Indices. The cause came on to be heard before the Lord Chief Baron of the Court of Exchequer on the 16th day of July, 1827, whereupon it was decreed that it should be and it was thereby referred to a trial at law upon the following issue, to wit, whether the Plaintiff in that cause (being the Appellant in this cause), as rector impropriate of the parish of St. Helen's, Bishopsgate, within the city of London, was or had been since the 25th day of March, 1822, entitled to receive from the Defendants, the said leather-sellers company, tithes in respect of the hall, hereditaments, and premises in the pleadings of the said cause mentioned, in the occupation of the said defendants, at and after the rate of 2s. 9d. for every 20s. rent or value, and at the rate of 16½d. for every 10s. rent or value by the year, and so above the rent or value of 20s. by the year ascending from 10s. to 10s. at the rate aforesaid.

The Respondent was also prepared to show, that in all or most of the cases in which decrees had been made for tithes claimed under or by virtue of the said statute and decree, the question, whether the decree had or not been enrolled, had not been raised; and that evidence had not been gone into in such suits, to prove that the decree had not been enrolled.

forming a judgment on the question sent to them than the Court had ; there can be no parol evidence on the case on which a jury could be required to decide with reference to the character or credit of conflicting witnesses.

The existence of the law, and the usage of the city of London derived from the statute 37th Henry VIII., and the award, and the judgments and decisions of the several courts of law and

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The following is an extract from the third volume, folio 999, of the statutes of the realm, printed by command of His Majesty King George the Third, in pursuance of an address of the House of Commons of Great Britain, from original records and authentic manuscripts.

“ A. D. 1545, 37th Henry Eighth, c. 12.

“ This decree is not inserted in the earliest printed copies of the statute of this year. It does not form part of the Act as entered on the enrolment of the statute in Chancery, nor has it been found in anywise enrolled in Chancery, nor is it now annexed to the original Act preserved at the Parliament Office. It appeared in the alphabetical collection of statutes, printed under the name of Rastall, so early as 1579, and, being afterwards inserted in the collection of statutes edited by Pulton in 1618, has been continued in subsequent editions to the present time. It was printed from an entry in a register book of the Bishop of London, preserved in St. Paul's Cathedral (Bonner, A. D. 1539 to 1559, folio lxxxix.), immediately after an entry of the Act of Parliament to which it refers, by the following marginal note,—“ ‘ Decretū interpōitū intuitu actus predicti.’ From the copy of an indorsement on the decree, also entered in the same register, it appears that the decree, signed and sealed, was delivered on the 25th of February, the day after the date thereof, to Bonner, then Bishop of London, by the Archbishop, &c. whose signatures appear to the decree ; and that the bishop, on the same 25th day of February, delivered it to his register, to be safely kept in the registry. The original instrument, however, has not been found.”

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equity, recognizing the law on the subject, as matters of public notoriety.

For the Respondent.—*The Attorney General, Sir Charles Wetherell, (and Mr. Koe.)*

The Appellant not having proved that the decree has been enrolled, nor any facts from which such enrolment can be presumed, he was only entitled to an order giving him an opportunity of trying the fact.

14th Dec. 1830.

The Earl of Eldon.—The Appellant in this case filed his bill in the Court of Chancery, stating, that he was lawfully seised and possessed of the impropriate rectory of St. Helen's, Bishopsgate, and in that character he claims the tithes of that impropriate rectory; and if he has a legal title to those tithes, I apprehend there can be no dispute he is entitled to have an account of what is due to him from the Respondent on the score of that legal title. He filed his bill in the Court of Chancery, praying, as I understand, that an account might be taken of all sums of money due to him from the Respondent for tithes, the title to which he stated himself to have derived as I have mentioned.

The cause was originally heard before the present Master of the Rolls, who ordered the trial of an issue, which order on the part of the Master of the Rolls, directing that issue, has brought this case before your Lordships, the Appellant insisting that no such order ought to have been pronounced.

It is perfectly clear, and cannot be questioned now, that if it is a case depending upon a mixed question of law and equity, the judge in equity has

himself a right to decide upon the circumstances which raise that question ; but I am very ready to agree, that in a very great many cases it would be very wise to send an issue to a court of law, in order that the judge in equity, who is to judge of the equity and the law, may have his conscience better informed, and be better able to apply the law to the facts and circumstances of the case. This being an appeal to your Lordships as a court of equity, (for you are sitting here to decide upon the same principles as the Lord Chancellor ought to decide upon the law,) I take it to be extremely clear that you ought to send an issue to be tried, if you are satisfied it is that species of case which requires such a proceeding, upon the view of the whole circumstances of the case ; but, on the other hand, if you are perfectly satisfied that the plaintiff has made out his title, and that you cannot act against that title without overturning a long series of decisions, in my humble judgment, in that case, you ought not to send to a court of law, but, as judges of the law, you should decide the law, applying the law to the facts and the evidence.

Now, it is admitted that the Appellant is lay impropiator of the tithes of the parish. He shapes his title upon the Act of the 37th Henry VIII., and the question for you to decide is, whether, after all that appears to have been done upon a careful search, and after all that is to be found as having been pronounced by the courts of law upon the subject, you feel yourselves satisfied that the Appellant, founding his title upon the Act 37th Henry VIII., is entitled to your decree in the first instance ; or whether, on the other hand, you shall send the impropiator to get better evi-

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dence, if there can be better evidence, before a jury, and afterwards decide whether that jury have come to a right conclusion.

When this case came before the House the other day, the nature of it was not immediately understood, and therefore, being a case of importance, a noble friend of mine thought it proper that the judges should be called upon to assist your Lordships with their advice; but when we came to see the nature of the case, it was clear there was no question that could be properly submitted to the judges for their consideration, because it does not depend upon a question of common law, but how the Court of Chancery ought to exercise its jurisdiction in applying the law to the fact.

When I have stated that this gentleman represents himself as the impropiator, I have gone some length to show that, considering what have been the decisions in courts upon the subject of this Act of Parliament and the enrolment of this deed, it is clear that an impropiator may sue and has sued with effect under this Act. The decisions of our courts of justice, that an impropiator under this Act, whether there be a producible deed or not, has a right to sustain such a suit as this, is of itself an indication (if there was no other) that our courts below have held that this Act, notwithstanding the objections that have been made to it, is an Act of Parliament in force under which an impropiator may recover; and if an impropiator may recover, it does not appear to me that the objection I am about to mention is an objection that could be pressed with effect against him, and it cannot be pressed against any other persons who claim a title under the Act. In reading the Act

37th Henry VIII. you will find that it recites that there had been various strifes, contentions, and differences between the clergy of the city of London and their parishioners; those very strifes, contentions, and differences the Parliament endeavoured by the statute 37th Henry VIII. to allay and appease; unfortunately they have not effected their purpose.

I will here state a circumstance that occurred in ecclesiastical history. After there had been a settlement of what were the sums to be paid to the clergy of the city of London, the benefices in the city of London were augmented by means which were extremely singular. The clergy of the city were to be paid by some kind of offering, to be made upon a certain day in the week, and also upon every saint's day in the year; the Pope thought proper to introduce into the calendar a large number of saints in addition to those that stood in the calendar, and by that innovation the clergy received from the inhabitants a larger sum than was originally intended; so matters continued till the 37th Henry VIII., when it was referred to certain dignitaries and authorities to make a decree, which decree was for ever to settle that which was to be claimed on the one hand and paid on the other.

These men (very many of them eminent men) did certainly make such a decree, and the question in the cause is, whether that Act of Parliament has made it necessary that in all future times, at the distance of three centuries or five centuries, you should be able to prove by demonstration that there was an enrolment of that

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decree. Upon looking at the whole of the Act I am very far from saying that I think the enrolment was not made necessary by the Act of Parliament. I think it probable, after all that has passed, that the enrolment was made necessary; and then comes the question, whether, because at this day, within a very few years I think of three centuries, that enrolment cannot be found, you are to say that the Act is good for nothing; or whether, on the other hand, you are not justified, in point of law, in presuming that there was an enrolment, although it is not producible at this day.

It has been intimated intelligibly at the bar, with respect to what may or may not be presumed, that I had observed, upon a doctrine which fell from one of the greatest men that ever sat in Westminster Hall, that whoever said that judges and juries might presume even an Act of Parliament was mad. I desire to disclaim ever having made such an observation upon such a great name and character as that which was alluded to. The fact was, that in the case to which the allusion was made a presentation to a Crown living had been made by a private individual, and Lord Mansfield seems to have entertained the opinion that that presentation was a ground to infer that the Crown had granted the right by patent, or some particular species of conveyance, and that you might presume that as well as you might presume an Act of Parliament. The expression did not fall from me; but I do recollect, that when I was arguing a case in the Court of Exchequer, as counsel, the then Lord Chief Baron Eyre did use

this expression — he said, “If that is the case, we may just as well have no statutes.” Another learned judge in my recollection stated, he thought it infinitely too strong. But if you may not presume to that extent, nobody will dispute, that if there has been a species of enjoyment of property for a very long series of years, which species of enjoyment never could have obtained without a legal origin, we must presume it had a legal origin.

No time runs against a demand for tithes. In many cases estates have been enjoyed in which no tithes have been rendered; and courts of equity, since I have had the honour of being at the bar, have held, that if that case only was made out, it would not operate as an exemption, but if there had been for a very long period of time no payment of tithes, under circumstances which make it probable that there might have been originally a title to those tithes, courts of equity have left the claimant to make out his title at law. A vast length of time might have a different effect: there are cases in which courts have held, that possession for 250 years might be the ground for presuming that title deeds had been lost, which title deeds, if producible, would have given effect to a claim. This is a sort of doctrine I am very sorry to mention. I know that the prejudice which exists against tithes has brought to light many title deeds that were not before known to exist.

With respect to the evidence of enrolment in this case, I observe, first, that from the time when this Act of Parliament passed to the present time; which is now nearly 300 years, cases have occurred

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again and again, in every one of which the judgment has been founded upon the idea that an enrolment must be presumed; and when the question arises whether an impropiator is within the Act, am I to presume, when judges of that day, one after another, have decided that an impropiator was entitled, that there was no enrolment, if, according to the true construction of the Act, enrolment was necessary?

I go further. What is to become of that large class of cases in which issues have been directed, not to try whether an impropriate rector under this Act of Parliament was entitled to this payment of 2s. 9d., but whether there was a payment less than 2s. 9d. in the pound that deprived him of the right to call for that 2s. 9d. in the pound? What would that signify if this objection of the non-production of the enrolment is a valid objection? If its not being capable of being produced at the end of 300 years was fatal, what would it signify to have tried the various cases in which the question has been, whether certain persons were or not exempt from that Act of Parliament? I recollect in one case there was a question, whether the Dean of St. Paul's was liable to be called upon for payment under this Act of Parliament; the judges held he was liable, and I dare say they would not have so held unless they had felt they were bound to adhere to the Act of Parliament, and decide that he was not a great man, for, according to the provisions of the Act, no one is exempt from the payment of tithes but noblemen and great men; but whether he was a great man or otherwise was not in the smallest degree material if

the non-production of that enrolment would have put an end to the claim.

So, what are we to say of cases where landlords have taken fines, and then let the estate for a diminished rent? And the question was, whether the value of the fine was to be taken into the estimate of rent in order to calculate the value of the tithes, or whether it was to be taken upon the amount of the actual rent. How could such a question arise, or how could the claim of the clergyman to have the tithe augmented with regard to the fine be material, if the non-producibleness of the enrolment put an end to the claim made and all question of calculation? In the cases argued in the Court of Exchequer the point has been decided over and over again, and no objection made to the jurisdiction. The statute gives a jurisdiction to the Mayor; and if he does not decide the question between the parties, it gives it to the Lord Chancellor, not the Court of Chancery. There have been several cases of decisions in the Court of Exchequer, which would have been absurd if the objection to the non-production of the enrolment is an objection that ought to be fatal. The non-producibleness would also apply to a great many questions of the same nature in the Court of Chancery. Over and over again the question has arisen, whether the Court of Chancery had jurisdiction. It was said that the Act having given a special jurisdiction to the Lord Mayor, and a special jurisdiction to the Chancellor, the Court of Chancery had nothing to do with it; but the Court said, "Here is a matter of account;"

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and the Chancellor in Chancery is entitled to compel an account although no enrolment was produced, and it forced the party to account, according to the terms of the Act of Parliament.

There are an infinite number of other cases, and you would be taking it for granted that all the judges in the land had been acting against the law of the land, if this objection, that the enrolment cannot now be produced at the end of 300 years, is to be sustained as a valid objection.

There is another circumstance which appears to me likewise deserving of very great weight. You have heard at the bar that the enrolment was made upon such a day, and was of such a date. You have heard likewise, although not given regularly in evidence, that certain persons filed bills in Chancery, stating that there was no enrolment, but still contending there were tithes due, and calling for an account. I mention this only as another species of strong opinion upon the effect of the enrolment or non-enrolment of any deed.

What are we to say to the fact, that in the memory of all living men, the citizens of London have paid tithes under this Act? Are the citizens of London so fond of paying tithes, and so liberal as not to take advantage of their non-liability to pay tithes? Do they differ from all other persons not liable to render tithes? The fact of these circumstances existing for two or three centuries is enough to enable us to presume that there was an enrolment, although the enrolment cannot be produced at this time of day. I have myself, in another situation which I formerly held in the profession, had occasion in some causes to

discuss the rights of the clergy under this Act, and I can never believe that the men before whom I argued those cases were not aware that there was no enrolment under that Act of such a deed. Sir Jas. Mansfield was in opposition to me in those suits, and to do him justice he never neglected an objection upon which he fairly thought he could stand; I must also do him the justice to say, that he never pertinaciously adhered to an objection which he did not think well founded. In all those cases the judges, counsel, and every body were satisfied, from the long train of decisions and this long-connected usage, from the payments made by those liable to pay, and who had paid, during the existence of the Act, that at the end of three centuries it ought to be presumed that the deed was enrolled. If you are to go back to that distance of time to inquire into the origin of every thing done in courts of justice and out of courts of justice, to inquire whether deeds or decrees are to be found, it would shake to the foundation most of the titles to property of any value that we have in this country.

It is therefore upon these grounds that it appears to me that an issue ought not to have been directed; and I go further—I do not think this is the issue that should have been directed: if any should have been given, it should have been a more comprehensive issue. I shall therefore submit, that this decree of the Master of the Rolls, if your Lordships concur with me in this view of the case, *ought to be reversed*. What the judgment is to be that shall be substituted instead of it cannot be so well settled at this moment as it may be by

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taking an opportunity, with pen, ink, and paper, of putting it in the right form, and afterwards submitting it in that form for the judgment of the House.

Lord Wynford.—Although I agree with my noble and learned friend that it is not necessary that a question should be put to the Judges, it being a case depending upon a point of equity, and not a question of law, I have obtained from the judges material assistance in enabling me to form an opinion upon this very important question. This case came before me some time ago in the Court of Common Pleas, when I had the honor of being Chief Justice in that court. It was an action, first, upon a composition for tithes ; secondly, a claim upon the general law. Upon that occasion the plaintiff obtained a verdict for the composition. There was then an express issue raised, whether this deed was enrolled. When it was first started, it occurred to me, as this question had been so often settled in courts of justice, though the issue was expressly raised, I ought to direct the jury to presume the deed enrolled. But I was told by one of my learned brothers in that court that the thing had never been settled at all — that my recollection was most imperfect ; upon which I left the question of fact to the jury, reserving for the consideration of the court, whether they ought not to have acted upon the presumption. A motion was afterwards made to enter a nonsuit upon the point so reserved. The Court of Common Pleas granted a rule to show cause ; that rule was afterwards generally discharged ; and as the case is stated in a very good book upon the law of

tithes, I see it is said that it was discharged because the Court thought it was properly left to the jury. That is undoubtedly a mistake. The fact is, that the plaintiff was content to take his verdict upon the count for the composition, which would not raise the point, and they suffered the rule to be discharged.

Afterwards this bill was filed. I recollect that I had my doubts upon the law, in the court of common law, as to directing the jury to act upon the presumption; and therefore I thought it right to trouble the learned judges to attend, that the point might be settled. If I could now be restored to a court of law, I would direct a jury to presume the enrolment, because, although the judges in a court of common law differ from the judge in equity, he being the judge of the law as well as the fact, I think the time has now arrived, in a case of this sort, when a judge is justified in telling a jury they ought to presume an enrolment.

There are many cases which bear a strict analogy to this case. The custom of merchants and the customs of the realm are stated in pleading, and they used to be proved by witnesses; but they have been found so often that now the judges take judicial notice of them, and tell juries what those customs are. Is not this a case of that sort? Here are twenty-four printed decisions; all of which, as my noble and learned friend has stated, must have been wrong if this deed is not to be considered as enrolled.

At a very early period of the reign of Charles II. the question came before the court, upon an express issue, not by an action, for the recovery of tithes, and that is the reason why we have not had them

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frequently since. An action for tithes could hardly be supported on the statute, because the statute has given a specific remedy; but the question was raised, in the case I allude to, upon a false imprisonment, and that gave the occasion of submitting to the jury whether or not this deed had been enrolled, and the issue was found in favour of the enrolment of the deed near two hundred years ago; and from that time down to this, I presume it has been taken for granted, for certainly in no case that I am aware of, except this, has the question, as a question of fact, ever occurred in any court of common law. Whenever it has occurred, it has seldom come before a court of law; and for the reason stated, whenever it has come before a court of equity, that court of equity has taken it for granted. Your Lordships would be doing great mischief if these presumptions were now to be disturbed. It is like doing away the effect of statutes which have been truly said by great judges to be statutes of peace. There is an end of all right, when a question of this sort occurs, if it is to be left to a jury as a question of fact; if, after twenty-four decisions, in one of which it is expressly found, and in all of which it is recognized as a fact, that this deed was properly enrolled, it is not at this distance of time to be taken as a presumption of law that it was enrolled, I do not know when presumptions can by possibility arise.

It was argued, that you cannot presume in this case because it must be enrolled on a given day, and you have only to search at that time, and if you find it was not enrolled, then it is conclusive that it never was registered; but undoubtedly that argument proceeds upon a mistake. The decree

of the noble and learned persons to give effect to the statute was to be made before the 1st of March, but there is no time fixed for it being enrolled; there is no point of time we can fix upon and say, that not having been found there, you are to presume it is not enrolled. That being the case, you must look for this proof at the rolls for nearly three hundred years before you can say with safety it is not enrolled. What a dangerous litigation this would lead to. In a case of this sort, you must take it for granted it was enrolled, though at this day it is impossible to prove the fact.

My noble and learned friend has said that he never stated that presuming an Act of Parliament was presumption run mad. I have heard a noble judge say once, at *Nisi Prius*, and afterwards with more advice in the King's Bench, that he would presume two hundred Acts of Parliament; and Lord Kenyon stated that that was but a short mode of expressing what he really meant, and only a strong mode of putting a fact that was beyond dispute.

Some mistake has arisen upon the issue directed by the Lord Chief Baron, as if he had directed an issue of this sort. He directed no such issue. He seems to me to have assumed altogether that the deed was properly enrolled; for the issue directed was not whether there had been such a decree as this enrolled, but whether the parties were excused, by a particular custom in that parish, from paying according to the original decree. Now, the issue directed by the Chief Baron would have been quite idle if the decree was never enrolled.

As this is a question of very general importance in the city of London, I thought I was bound to

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take upon myself my share of stating, as shortly as I could, without doubt or hesitation, what was my opinion. I entirely concur in the judgment proposed.

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Ordered and adjudged, that the order complained of be reversed; and it is declared, that if to give effect to the Act of 37 H. 8. c. 12. it is necessary that the decree therein referred to should be enrolled, it ought to be presumed that such decree was duly enrolled; and it is ordered, that the cause be remitted to the Court of Chancery, to proceed therein as shall be consistent with this reversal and declaration.

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SCOTLAND.

(COURT OF SESSION.)

The Earl of KINTORE - - *Appellant* ;
FORBES and Others - - *Respondents*.

Fishing with stake nets on the sea coast, near the mouth of a river, is not prohibited either by the statute or the common law of Scotland.

Proprietors on the sea coast having grants from the crown with right of fishing limited to fishing with net and coble, cannot, on the suit of owners of fisheries in a river, be restrained from fishing with stake nets.

THE appellants in this case were owners of fisheries in the river Don in Scotland. The Respondents were owners of the property along the sea-coast not far from the mouth of the river Don. The property altogether comprised about seven miles, commencing at a part about two miles from the mouth of the river Don, and being on the sea-shore, was used for the purpose of catching salmon and other fish with stake nets. The proprietors of the fisheries of the river Don complained of this, as being an injury to their fishery, and commenced proceedings against the Respondents in the Court of Session, which ended in 1826, in a judgment against the Appellants. An appeal from this decision having been argued in the House of Lords,

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the following observations were made in moving the judgment.

The Lord Chancellor. — The question is, whether persons occupying property on the sea-coast, have, by the law of Scotland, a right, provided they have a right to fish for salmon, to place stake-nets for the purpose of fishing. This depends upon certain acts of parliament passed in Scotland at a very early period, and continued down for many years. It is not denied, that persons are entitled by the law of Scotland, to place cruives and other machinery in rivers, above the point where the tide flows, under certain circumstances, and under certain limitations and restrictions as to the manner in which that machinery is to be used, as to the construction of the machinery, and as to the time and period for which it is to be used. What I have stated relates to those parts of rivers which are above the point to which the tide flows. No persons, by the law of Scotland, are entitled in those parts of the river where the tide flows, to place machinery of this description.

The question with respect to the river Tay came on in the year 1816, before the Court of Session, and afterwards came by appeal to this House. The river Tay terminates in a firth or arm of the sea; and the question was agitated in the Courts of Scotland, whether or not, by the law of Scotland, stake nets could be put in the river Tay, or rather, I should say, in the waters of the firth of the Tay, consistently with the acts of parliament to which I have referred. The Court of Session in Scotland was of opinion, that the acts of parliament prohibited absolutely the placing of machinery of this description in that part of the

water or firth of the Tay. The case then came to this House, and your Lordships affirmed the decision of the Court of Session; but in the argument which took place upon that subject, and finally in the judgment of your Lordships, care was taken not to decide the question with respect to the right of placing stake nets on the sea-coast, and therefore the question between those who are the parties to this appeal, came, on the present occasion, for the first time, unfettered before the Court of Session in Scotland.

The Court of Session was of opinion, that the acts of parliament did not apply to the sea-coast; and the question for consideration will be, whether the judgment of the Court of Session in that respect be or be not correct.

The first statute referred to, was passed in the reign of Robert the First, in the year 1318. It is quite obvious, upon the language and construction of that act of parliament, that it was never intended to apply to the sea-coast. The words are these: — “*Item ordinatum est* et assensum quod
 “ omnes illi qui habent croias vel piscarias, vel
 “ stagna, aut molendina, in aquis ubi ascendit mare
 “ et se retrahit, et ubi salmunculi vel smolti seu
 “ fria alterius generis piscium maris vel aquæ dulcis
 “ descendunt et ascendunt, tales croiæ et machinæ
 “ infra positæ sint ad minus de mensura duorum
 “ pollicum in longitudine, et trium pollicum in
 “ latitudine, ita quod nulla fria piscium impediantur
 “ ascendendo vel descendendo secundum quod
 “ libere possint ascendere et descendere ubique.”
 That particular expression of ascending and descending is repeated two or three times in the act of parliament; and it is clear, therefore, that it

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had reference to streams, or the continuation of streams; that it had in point of construction no reference whatever to the sea-coast.

The next act of parliament was passed about a hundred years afterwards, in the reign of James the First of Scotland. It is in these words: —“ It is “ ordainyt that all cruives and zaires,” which words, by the judgment of this House, have been interpreted to mean machinery similar to stake nets, “ set in fresh waters, quhair the sea fillis and “ ebbis, the quhilk destroyes the frie of all fisches, “ be destroyed and put away for evermair, not “ again standing onypriviledge and freedome given “ in the contrairie, under the pain of one hundred “ shillings; they have cruives in fresh waters that “ they gar keepe the lawes anentes Satterdies “ slop, and suffer them not to stande in forbidden “ time under the said paine, and that ilk heek of “ the foresaides cruives be inche wide, as the aulde “ statute requires.” It speaks, therefore, of fresh water, and it speaks also of fresh water “ quhair “ the sea fillis and ebbis,” evidently denoting rivers, and channels similar to rivers. It has been said, that the word “ fresh” may possibly be a mistake; that we have not the original record of this act of parliament; and that the word “ fresh” may have been introduced, because, in reciting this act of parliament in a subsequent act, the word “ fresh” is omitted; but still the words, “ water quhair the sea fillis and ebbis,” are retained.

Without going through other acts, I think I am justified, upon the terms of this act, in repeating, that in the earlier acts it is perfectly clear that they do not in their terms embrace the sea-coast. When

we come to advert to acts of a later period, the language is more equivocal and more general ; but taking the later acts in connection with the earlier acts, and construing one with the other, the conclusion is, that the acts, taken together, refer not to the sea-coast but to rivers.

As to the case of *Dalgleish v. The Duke of Athol*, with respect to the waters of the Firth of Tay, the construction which the Court of Session put upon the acts of parliament now, is perfectly consistent with the construction which they put upon the acts in that case, and the construction which this house also put upon those acts.

It is remarkable that the writers on the Scotch law, Bankton, Erskine, and Lord Stair, in referring to those acts of parliament, do not in any instance apply them to the sea-coast ; they speak of the prohibition as applicable to rivers, and to rivers only. I am not insensible of the argument which was urged at the bar, that the attention of those writers was not directed to the question precisely as it is now raised ; but it is impossible to suppose, that those learned writers, in writing their institutional works, and adverting to those particular acts of parliament, should not have taken the pains to read them ; and it is impossible to suppose, that if they had considered the interpretation of them as extending to the sea-coast, they would have expressed themselves in a limited way, confining their expressions to rivers and to rivers only.

This case was also argued upon another principle, namely, that even independently of the construction of those acts of parliament, the owners of the fisheries in the Don would have a right to complain of the

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erection of these works on the principle of the common law. Now, although that principle was glanced at in the Court below, it does not appear to have been seriously argued before the Court of Session; and at the bar of the house it was argued by an English counsel, upon English principles, and citing English cases, most of which I have looked at with considerable attention; but which, when they came to be sifted and examined, appear to me to have no bearing whatever upon the present question. If, therefore, you are satisfied upon my representation as to the interpretation of those acts of parliament, that they are not to be considered as extending to the sea-coast, the state of this question cannot be altered by any reference to the principle of the common law, either as applicable to Scotland or England.

Another point has been insisted upon in the papers, and also at the bar; but it does not appear to me to be entitled to much attention. It is said, that the proprietors of these fisheries on the sea-coast have no right, by the terms of their grant, to fish in this manner, and that they are entitled only to fish with what is called a net and coble; and that, having taken upon themselves to fish in a different manner, the proprietors of the fisheries in the river Don have a right to complain of it, and on that ground to sustain this suit. I apprehend it is quite a mistake. These persons became proprietors of fisheries on the coast originally by grant from the crown; and if their grants are so limited, that in point of law (upon which I do not wish at present to pronounce any opinion) they are not entitled to fish in the manner described, namely, by the use of stake nets, that is a question

between them and the crown. The crown may have a right to complain, that the exercise of the right conveyed by the crown has in that instance been exceeded; and possibly, under such circumstances, the crown might, by its public officer, institute some proceeding against them; upon which, however, I wish carefully to abstain from expressing any opinion, but the proprietors of the fisheries of the Don have nothing to do with that. The question with respect to the proprietors of the fisheries of the Don, is, whether they have a right, by the existing law, to complain that persons who possess property on the sea-coast, and have a right of fishery on the sea-coast as extensive as the crown can grant, are entitled to fish by means of stake nets; and whether they can make out that the laws of Scotland prohibit, under such circumstances, where the sea ebbs and flows, the use of machinery of that description. Now, I apprehend that, looking at these acts of parliament, they do not apply to fisheries on the sea-coast; and that the proprietors of fisheries on the Don have no right to maintain this suit.

Judgment affirmed.

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(COURT OF SESSION.)

JOHN DICKSON and Others - - *Appellants;*
WALTER GRAHAM - - - *Respondent.*

By the law of Scotland, an *interim curator bonis* (provisional committee of the estate) may be appointed by the Court of Session, without notice to the party affected by the appointment, and without cognition or inquest before a jury.

Whether the word "interim" means until the patient recovers his faculties, or until some more regular proceeding is instituted. *Quære.*

By the law of Scotland, a man of weak understanding may appoint *Interdictors* by a deed, which binds him to do no act affecting his estate without the consent of the persons appointed *Interdictors*.

Interdictors so appointed having instituted proceedings in the Court of Session to recall a subsequent appointment of an *interim curator*, which was sustained with costs against the interdictors: Held, after a remit to ascertain the practice of the Court of Session, that the judgment should be affirmed, but without costs.*

July, 1828. *THE Earl of Eldon.* My Lords, This was an appeal brought by John Dickson, Archibald Gibson, Andrew Steele, and James Knox, stating themselves to be interdictors of Mr. James Bryce, who is represented to be some time student of divinity,

* The facts appear sufficiently stated in the body of the judgment.

thereafter teacher of languages in Edinburgh, and the said Andrew Steele as his agent. The Respondent was Mr. Walter Graham, who was the *curator bonis* to James Bryce. This gentleman, at the time when these transactions took place, was represented to be so weak in mind, and so unable to take care of his own affairs, as to make it necessary to execute an instrument, which, by the law of Scotland, is termed an instrument of interdiction, an instrument by which he consents to do no act without the concurrence and consent of those four gentlemen who are named as interdictors.

The law of Scotland certainly allows a man to place himself in that situation. The books, I think, represent that the principles of the law of Scotland is this, that a man who possesses a sufficient portion of reason to be conscious of the weakness of his own understanding, not furious nor fatuous, but a man so satisfied that he ought not to trust himself with his transactions, may execute an instrument, binding him not to do any act with respect to his estate, without the consent of those persons whom by the deed he authorizes to superintend for him; or, in other words, without whose consent he binds himself not to act. I understand the law of Scotland to have permitted persons in that situation to which I have adverted, to place their affairs under the direction of others, in a mode which may be more pleasant to them than that of resorting, as originally it was thought necessary, to a suit, in order to pronounce that the individual was not a proper person who should be trusted to administer his affairs.

This instrument being executed, an application

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was made on the death of a brother of this unfortunate gentleman, Mr. James Bryce, by a brother-in-law, a gentleman who had married his sister, to have a *curator bonis* appointed to take care of him, something in the nature of a committee of the estate of a lunatic in England. A medical gentleman of the name of Abercrombie, certified that his state was such, that some person ought to be authorized to superintend him; and upon an application to the Court of Session to appoint such a person, the Court of Session appointed Mr. Graham, who was the husband of the sister.

The first step taken in the Court of Session desiring that that appointment might be recalled, was in January, 1818; and on that occasion, the Court of Session pronounced this interlocutor, which is the first interlocutor appealed from. "They refuse the prayer of the said petition, and "assoilzie from the conclusions of the same; and "find the several interdictors with whose consent "the said petition has been offered, conjointly and "severally liable to the Respondent in the expences of process; appoint an account thereof to "be lodged; and remit the same when lodged to "the auditor, to tax and report." This is an appeal from this interlocutor, in respect of the expences of the process, an appeal by these four gentlemen, who are the interdictors under this deed. This order to pay the expences of the process was resisted with respect to three of the parties, on the ground that they took no part in the business. There was a petition afterwards presented by Bryce himself; Mr. Steele, one of them, also resisted on the ground that he appeared only as agent for the interdictors.

In the petition made in the name of James Bryce, an application was made to the Court that there might be a process of cognition. That is a proceeding in the nature of our commission of lunacy, in order to determine whether this person was in that state in which it was proper that this *curator bonis* should be continued. Upon that petition, the Court pronounced this interlocutor: “ They remit to the sheriff-depute of the shire of “ Edinburgh to enquire concerning the condition “ of intellect and state of faculties of the petitioner James Bryce, and his abilities to manage “ and conduct his own affairs, and also concerning “ the truth and sufficiency of his grounds of complaint of harsh or improper treatment, or neglect “ of his comfort on the part of Walter Graham, his “ *curator bonis*; authorize and direct the said “ sheriff to proceed in the enquiry, by personal “ visitation of, and intercourse with, the said James “ Bryce, at various times, and without previous “ warning or concert, as also by examination upon “ oath of such witnesses, suggested by either party, “ who have sufficient cause of knowledge respecting the premises, and likewise by the opinion of “ medical persons named by the sheriff to visit “ him, and ordain the said sheriff to report his “ opinion on the said matters, and each of them, to “ the said Lords; and in case a minute shall be “ offered on the part of the said James Bryce, “ praying for a direction to the sheriff to proceed “ in the said matter by jury or inquest, allow the “ clerk of process to receive and mark the same “ as part of the process, and also the said *curator bonis* to answer the said minute in case he shall “ see cause so to do.” So far, therefore, the Court

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of Session corrected its own original proceedings, by requiring a more minute and careful examination of the state of this person; and under the order of the court, the sheriff-depute of the shire of Edinburgh proceeded to enquire into the state of this person. The report of the sheriff-depute, the present Lord Advocate, was to this effect:—

“ In compliance with the remit, the reporter
“ called upon James Bryce, the individual therein
“ referred to, on various occasions in the course
“ of the last four months, without any previous
“ warnings, and had also particular access to see
“ him in the course of the examinations of wit-
“ nesses which has taken place under the above
“ remit. The Reporter also directed Doctors Spens,
“ Farquharson, and Wood, to visit the said James
“ Bryce, and has taken their examination upon
“ oath, as well as that of the witnesses suggested
“ by either party, as having sufficient cause of
“ knowledge respecting the premises; and he now
“ begs leave to report, 1st, That from the appear-
“ ance, manners, habits, and conversations of the
“ above-named James Bryce, it appears most de-
“ cidedly to the reporter, that that person labours
“ under a very great degree of mental imbecility,
“ and that he is utterly incapable to manage and
“ conduct his own affairs. This impression seems
“ fully confirmed by the united opinions of all the
“ medical men who have been examined, and is
“ indeed supported by the whole other evidence
“ which has been led, and which farther shews
“ that Bryce’s defect of mind is not of recent
“ origin, but has been progressive for a period of
“ nearly thirty years. This circumstance, while
“ it almost excludes the hope of amendment, is

“calculated to remove all idea of the appearance
“which this person exhibits (the mental malady)
“being produced from, or even affected by the
“judicial proceedings which have been going on
“concerning him. Indeed, the reporter has had
“occasion, in the course of the various cognitions
“that have gone on before him, to observe that
“persons of deranged intellect are at times capable
“of assuming an extraordinary command over
“themselves, and can contrive so to speak and to
“act for a short space, as not unfrequently to
“induce juries to return verdicts in their favour,
“while the real state of the party would warrant
“a different deliverance. It particularly struck
“the reporter, as affording material evidence of
“the state of Bryce’s mind, that in the course of
“the examination of witnesses, at which this person
“was present, he evinced no power of any such
“command over himself, nor could he even fre-
“quently be induced to keep silence, though re-
“commended to him by those who were attending
“to his interest. With respect to the alleged mal-
“treatment, it will be seen from the proof that
“this rests upon no better ground than that of
“Bryce having, for some time past, made general
“complaints of that nature to certain individuals,
“a circumstance on which no reliance can be
“placed, as the making groundless complaints
“of this nature is a very usual symptom of, and
“attendant upon derangement. In so far as the
“reporter has been able to ascertain it, the conduct
“of Mr. and Mrs. Graham towards Bryce has been
“marked with all proper degree of kindness and
“attention, and he himself appears to have been
“sensible of this, and to have been satisfied and

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“contented, until some individuals in the neighbourhood where he resided, possibly from humane, but certainly from mistaken motives, appear to have encouraged the suspicion of ill usage, which Bryce’s state of mind was so much calculated to engender. With regard to his present residence, it appears to the reporter that his room is good, that all due attention is paid to his comfort, and that Mrs. Paterson, with whom he resides, is a person well calculated for such a charge.”

This report was dated in the month of December 1818, and it came under the consideration of the Court as early after that as February 1819. The report being prepared, but not actually brought before the Court, and Mr. Steele declining any longer to continue agent to Mr. Bryce, an application was made to the Court to appoint another, who was accordingly appointed. But that appointment was made at a time when the litigation had been conducted under the direction of Mr. Steele, and he was considered by the Court liable to all expences, as the agent who had carried on the business up to the month of December 1818. He ceased to be agent at this time certainly, and on his application another agent was appointed; but he acted down to the period which elapsed between the remit to the sheriff-depute and his report. When the report was about to be prepared, and the consideration of it to be entered upon in the Court of Session, then he withdrew.

The appeal therefore has, in my opinion, been brought quite irregularly by the four interdictors, with regard to the first part of the case, in which they were all of them represented by Mr. Steele;

and with reference to the order made, that Mr. Steele should pay the expences till he ceased to be the agent previous to the last act of the Court of Session.

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When this case came before the House of Lords some time ago, it struck me, and it likewise struck some other Lords not now attending the House, that this was a very extraordinary course of proceeding in its nature, comparing it with what is the course of proceeding in this part of the kingdom, that a person should have applied to the Court of Session, and should have received immediately an appointment to take care of another and his affairs, on the ground that he was incapable of taking care of himself and his affairs; that there should be no course of inquiry on the Court being so applied to, nor any notice given to the party; and that this was at least a proceeding, with reference to which this House should very well consider what the law of Scotland was, before it concurred in the acts which had taken place; particularly with reference to the care exercised in matters of this kind by the Lord Chancellor of England, it being well known that the Court of Chancery cannot appoint any person to take care of a supposed lunatic or his property, unless a jury shall find that the man is of unsound mind; and that even after the finding of a jury, that the party is of unsound mind, the Court will do nothing while a traverse is depending; the traverse allowing to those who are interested, another opportunity of questioning the fact. But here, according to what is stated to be the law of Scotland, the Court proceeds without cognition to appoint a person to take care of the party, and to

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take care of him according to the act of sederunt "in the mean time." Whether these words, "in the mean time," really mean in the mean time till there is a more regular proceeding, or whether they mean that the appointment is made to continue until the man shall be able to manage for himself, may admit of question. The act of sederunt was certainly open to a different construction, according to what the different parties contended.

When this cause was heard, it was thought necessary by this House to desire the Court of Session to consider whether they could take this course according to their law, or whether there was not a necessity for a cognition to issue, in order to have the finding of a jury on the case. We have since received for answer to that question, that the Court has been in the habit of proceeding in this course for so long a period, that I do not think it proper to advise the House to hold that this is not a legal proceeding on the part of the Court in question. If it was legal, attending to all the circumstances and dates of these proceedings, this House could not hold that the interlocutor was wrong, or that it was not competent for that Court to say, whatever were the motives of Mr. Steele, that he was liable for the costs of the proceeding as an officer of the Court, and as the party applying to the Court to set aside the proceeding. The judgment of the Court ought, under those circumstances, to be affirmed, but without costs in the appeal case. The appointing a person to exercise the duties of *curator bonis*, is taking a very considerable liberty, to be justified only by necessity; and this is the first case which has occurred in this House in which

the practice of the Court of Session has been established. That practice is not in conformity with the course observed in this country in the case of one who is represented, according to the language of the commission, as a lunatic. A commission is not issued unless a sufficient ground is laid, and even then, if the jury have found that he is a man of weak mind, that will not do; but if they find not that he is a lunatic, not that he is fatuous, but that he is of unsound mind, that is sufficient to sustain the commission. The way in which we have always proceeded, is to issue a commission; and if the jury so find upon that representation, that he is of unsound mind, the care of the Court is thrown around him. That, I think, would have been a fair notice. If that course had been adopted, and these parties had then introvened, I think the appeal ought to have been dismissed with costs; but there having been no such proceeding in the first instance, though it appears to me that it would be too much to say, that the proceeding of the Court of Session, and all the proceedings incident upon their proceedings for a long series of decisions, are such as cannot be upheld, I think that they ought to be affirmed without costs. I cannot conclude without saying, that I wish there was some law to regulate these proceedings in Scotland.

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(COURT OF SESSION.)

WILLIAM TROTTER and Others - *Appellants*;YOUNG TROTTER - - - *Respondent*.

A will must be construed according to the law of the country where it is made, and the testator is domiciled.

The will of a subject of Great Britain made in India must be construed according to the laws of England.

Upon a question arising in the Court of Session on the doctrines of the law of England, the Court is justified in taking and acting upon the opinions of English lawyers, given upon a case laid before them.

Money vested in heritable bonds becomes real estate, and where upon the construction of the will no clear intention can be collected to pass real estate, the heir at law taking a benefit under the will is not put to his election, but may take the real estate as heir, and also personal estate under the will.

A will by which the testator recites that "he considers it his duty, while in health, to execute a settlement of *all* his estate and effects," appointing executors in England and in India; and directing that the residue of his estate in India should be remitted to his executors in Scotland, and that they should divide that residue, and the *whole* of his *property* in Europe, equally between his brothers and sisters; Held *not* to pass the heritable bonds.

CHARLES TROTTER, being domiciled in India, remitted money to his brother William in Scotland, which he, to the amount of 1,900*l.*, and

under a power, invested in heritable bonds; of which investment Charles Trotter was apprised. In May, 1829, he executed a will in India, by which, expressing his affection for his brothers and sisters, and reciting that "he considered it his duty, while in health, to execute a settlement of all his *estate and effects*," he appointed his brothers George Trotter and William Trotter executors of his will in England, and other persons executors in India. He then, after giving various legacies in India, directed his executors there to remit the residue of his estate there to his executors in Scotland; who "were thereby instructed to divide the remainder of his estate as they received it from India, and the *whole of his property in Europe*, into six equal shares, to be paid, share and share alike, to each of his brothers and sisters, &c."

He died without issue in June 1829, leaving Young Trotter and William Trotter, who, at the death of the testator, were his only surviving brothers, of whom Young Trotter was the eldest, and also leaving sisters. Young Trotter, therefore, as heir, made up titles to the heritable bonds. The other parties claiming under the will insisted, that he was bound either to give up his claim to the personal property passing under the will, or to permit the heritable bonds to be divided as part of the personalty. To settle this question an action of *declaratur* was raised by Young Trotter, and an action of multiplepoinding by the executors; in the progress of which, a case was stated for the opinion of English counsel, upon the question whether Young Trotter was bound to elect? Sir James Scarlett and Mr. Shadwell having given their opinion that the heir

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might claim the heritable bonds without being put to his election, the Court of Session gave judgment in conformity with this opinion, and thereupon the other legatees under the will appealed to the House of Lords.

The case was argued in June, 1829.

The Lord Chancellor.—In this case a most material and important question is, how the will, which was executed in India, is to be interpreted, by what law? It was considered in the Court below, and undoubtedly it was held most properly, that the will was to be interpreted by the law of the land where it was made, and where the testator had his domicile, namely, India, that is by the law of England; and it was held, and properly held, as I conceive, by the Court below, that, although that will was the subject of judicial inquiry in the Courts of Scotland, the same rule was to be applied to the interpretation of it as if the will had been the subject of consideration and adjudication in the Courts of England.

The next question was, how the Court of Session were to ascertain what the law of England was with respect to this will? how this will was to be interpreted according to the law of India, or, in other words, according to the law of England. They followed that course which had been adopted on other occasions, in the cases of *Robertson v. Robertson*, *Wightman v. Dalile's trustees*, and other cases: the course which they had been in the habit of taking to ascertain how the law stood, namely, to direct a case to be prepared, stating all the circumstances necessary, for the purpose of raising the question of law for the opinion of

lawyers of this country. Accordingly, by one of the interlocutory decrees, it was directed, that cases should be stated on both sides. It was afterwards agreed, that a joint case should be stated with the concurrence of both parties, and and the opinion of the present Vice Chancellor* and the present Attorney General† should be taken, with respect to the import of this will according to the law of England.

It was stated at the bar, and I see by the papers it was also argued below, that in cases of this description, it is not unreasonable that, when any technical points arise in the construction of a will of this description, the Court of Session should resort to the opinion of lawyers of the country where the will or instrument was executed, but that this applies only to technical expressions: that where a will is expressed in ordinary language, the judges of the Court of Scotland are as competent to put a proper construction upon it as judges or lawyers of the country where the will was executed. But the judges below were not of that opinion; and it is impossible, as it appears to me, that such an opinion can be reasonably entertained. A will must be interpreted according to the law of the country where it is made, and where the party making the will has his domicile. There are certain rules of construction adopted in the Courts, and the expressions which are made use of in a will, and the language of a will, have frequently reference to those rules of construction; and it would be productive, therefore, of the most mischievous consequences, and, in many instances,

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defeat the intention of the testator, if those rules were to be altogether disregarded, and the judges of a foreign Court (which it may be considered in relation to the will), without reference to that knowledge which it is desirable to obtain of the law of the country in which the will was made, were to interpret the will according to their own rules of construction. That would also be productive of another inconvenience, namely, that the will might have a construction put upon it in the English courts different from that which might be put upon it in the foreign country. It appears to me, that there is no solid ground for the objection; but that where a will is executed in a foreign country by a person having his domicile in that country, with respect to that person's property the will must be interpreted according to the law of the country where it is made. It must, if it comes into question in any proceeding, have the same interpretation put upon it as would be put upon it in any tribunal of the country where it was made. It appears to me, therefore, that the judges were perfectly right in directing the opinion to be taken of English lawyers of eminence, with respect to the import and construction of this will according to the law of England.

The main question that was ultimately put to the learned persons to whom I have referred is this, — “Whether on the supposition of the “question having arisen for trial in England, “the heir would have been put to his election if “he had claimed money secured by heritable “bond in Scotland, as well as his share of the “personal estate under the will.” The answer is in these terms, — “Considering heritable bonds

“ in Scotland as real estates, to which the heir at law is entitled, unless they are conveyed away with due solemnity by his ancestor, we think the heir at law would be entitled in this case to claim them, without being put to his election, if the question had arisen in a court of justice in England.”

When that opinion was communicated to the Court in Scotland, the Court immediately affirming that opinion, decided in favour of the heir at law. The heir at law was undoubtedly entitled to take the real estate, — that is, the heritable bond; and the sole question was, whether, when he came in to claim under the will his proportion of the personal estate, it was required by law that he should be put to his election, that is, whether he should take the one or the other; whether he should allow the real estate to be connected with the personal, so as to form one mass of the property, and the whole divided, or should take the real estate, and give up the personal estate? Whether he was obliged or not to do this, depended entirely on this consideration, whether upon the face of the will there was sufficient to manifest a clear intention that the testator designed by his will to dispose of his real estate; because, if he intended to dispose of his real estate, although he had not carried that intention effectually into execution, the party taking under that will would not be entitled to have the benefit of the will, and at the same time to defeat the intention of the testator. The question was, therefore, simply a question of construction. Does it appear upon the face of the will that it was the intention of the testator to dispose of his real

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estate, that is, of those heritable bonds? Now, the rule of law in England with respect to subjects of this kind is well ascertained and well defined, and it is this, — that you are not to proceed by probability or by conjecture, but that there must be a clear and manifest expression of the intention on the face of the will, to include that property which is not properly devised, before the heir can be put to his election.

It has been contended at the Bar, that the construction put upon this will by the learned counsel, whose opinions have been taken by the Court of Scotland, was erroneous. I have looked at the opinion, and read it over carefully several times, and I see no reason for dissenting from the construction which is put upon this will. There are words in this will sufficiently large to carry the real estate; but, comparing one provision of this will with another, it chiefly points to personal estate, and to personal estate only. Executors are appointed, nothing is given to the executors, but they take merely by virtue of their character as executors; they take personal property only. There are executors appointed in Scotland, there are executors appointed in India, and the executors in India are directed to remit the residue, after payment of debts and legacies, to the executors in Scotland, and then the whole of the residue of the Indian estate, and the whole of the property in Scotland are directed to be divided into six portions, and paid to the respective legatees; throughout all these provisions, there is nothing to satisfy my mind with that clearness which is necessary to raise a case of election, that it was the intention of the testator to dispose by his will

of the heritable bonds. If I am asked to conjecture what his intention was, I have no hesitation in saying, that I should conjecture that it was his intention to give the real property; but there is not such an expression of intention on the face of this will as, I think, can justify your Lordships in giving it that effect. It is nothing more than conjecture; the intention is not expressed as it ought to be for the purpose of raising an election. I beg leave therefore to say, that I concur in the opinion expressed by the learned individuals to whom I have referred; and I think, under these circumstances, I must recommend to your Lordships to affirm the judgment of the Court below.

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(COURT OF SESSION.)

WILLIAM SPENCE - - - - - *Appellant;*ALEXANDER ROSS - - - - - *Respondent.*

And by revivor,

WILLIAM SPENCE and J. H. SAVIGNY, *Appellants;*ALEXANDER ROSS - - - - - *Respondent.*

Upon a sale of lands belonging to W. S. by agreement, under which the price is, by the conveyance, made a charge upon the lands, and a bond given by the purchaser (but not delivered) by which the purchase-money is secured to the vendor for life, and upon his death to his sons and their heirs, the trustee under a sequestration of a surviving son held entitled, in his right, to sell his interest in the bond, subject to the life-rent of the father.

THE appellant, in 1814, proposed to sell a piece of land to Sir John Hope of Pinkie, by a missive in the following terms : —

“ I agree to sell to you the ground near Mussel-
 “ borough belonging to me, and presently occu-
 “ pied by Government as barracks, for the price
 “ of 2000*l.* sterling ; your entry to be Martinmas
 “ old style, from which term the price is to bear

“ interest. The said sum of 2000*l.* is to be declared by the disposition a burden on the subject, and to remain in your hands at interest on a bond granted to me in life rent, for my life rent use allenarly, and to my sons, William and George, equally between them and their heirs in fee, the interest being payable to me during my life ; and, after my death, the same to be payable to my sons equally between them for two years thereafter, and the principal to be paid them at the elapse of two years after my decease. You are to rest satisfied with the titles that they are good, and to be at the mutual expence of carrying it over to you.”

Sir John proposed that the sons should consent that the purchase money should remain for eight years certain in his hands ; and a postscript was added to the missive in these terms : —

“ We, William and George Spence, sons of the aforesaid William Spence, proprietor of the barrack ground, hereby agree, that the above sum shall remain in Sir John Hope’s hands, at least for eight years certain, after Martinmas first, 1814.”

Sir John having accepted this offer, a disposition in his favour was executed by the appellant ; and a bond in terms of the missive was granted by Sir John. The disposition and bond were not delivered ; but Sir John, by virtue of the missive, entered into possession of the land, and from that time paid interest upon the bond to the appellant.

William, the eldest son of the appellant, died in 1819, unmarried and intestate. George afterwards became bankrupt ; and the respondent in the original appeal was appointed trustee under

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the sequestration, and in 1825 advertised the bond for sale, subject to the life rent of the appellant; whereupon the appellant instituted an action of suspension and interdict. But it was held in the court below, that by the transaction between the father and the purchaser, the right and interest in the bond, subject to the life-rent of the father, vested in the sons.

Against this judgment there was an appeal by the father; and upon his death, it was revived in the name of his disponsee, a minor, and his curator.

The judgment of the Court below was affirmed.

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(COURT OF SESSION.)

COLIN CAMPBELL - - - - - *Appellant* ;ALEXANDER ANDERSON - - - - - *Respondent*.

A bill drawn by an agent after the death of his principal *bonâ fide*, and without notice, held to be valid by the law of Scotland.

GORDON of Drakies, upon leaving England in 1808, granted to the respondent a factory, by which he was empowered to borrow money on account of Gordon to the extent of 5000*l.*; and for that purpose to subscribe bonds, and also to draw bills in his name, and on his account. This power was communicated to the commercial house of Campbells and Co., in which the appellant was a partner; and they agreed to advance to Anderson such money as he might require during Gordon's absence. In October 1809, the respondent informed Campbells and Co. that he should want 500*l.* for Gordon's use; and by their permission the attorney of Gordon drew upon them a bill of exchange for 500*l.*, at three months, dated from the 11th of November 1809, which he discounted with an agent for the

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Bank of Scotland, and advised Campbells and Co. accordingly.

Mr. Gordon died at Berbice on the 25th of August 1809.

Campbells and Co. having refused to accept the bill, an action was brought by the holder, and the amount recovered, against them; whereupon, the bill having been delivered to them, and their right in it assigned to appellant, he brought an action against the respondent, concluding for the reduction of the bill, repetition of the amount, and costs of the action. One of the grounds of action was, that the power of the respondent to draw the bill as agent ceased upon the death of his principal. But the Court below gave judgment for the respondent; and, on appeal, the Lord Chancellor observed that the law of Scotland was clear on the point, that if the respondent acted *bonâ fide*, in ignorance of the death of his principal, of which there was no reason to doubt, the judgment ought to be affirmed.

Judgment affirmed.

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(COURT OF SESSION.)

SPIERS and Others - - - - - *Appellants* ;HOUSTON's Executors and Assignees *Respondents*.

A guarantee of monies advanced by a firm, consisting of F. and Co. will not extend to a new firm, in which H. is introduced as a partner.

Payments made by the principal after the alteration of the firm, and in transactions with him, are applicable to the extinction of the balance due to the old firm at the date of the alteration.

IN October, 1808, Walter Logan, as one of the partners, and carrying on business under the name and on behalf of the company, of H. and R. Baird, applied to the Honourable Simon Fraser and Co. of London a firm consisting of the Honourable Simon Fraser and James Henry Houston for a cash credit; which they agreed to give on the following letter of guarantee, dated in January 1809, and signed by the appellants: — “We request you will accept the drafts which Mr. “Walter Logan, or any other persons by his appointment in writing, may draw upon you from “time to time, on account of H. and R. Baird, “founders at the Canal Basin near Glasgow; “and we hereby jointly and severally agree to “guarantee your reimbursement, together with all

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“damages or contingencies that may occur to
 “you from the engagements you may thereby
 “come under, to the extent of 7000*l.* for the
 “period of one year from the 31st December 1808,
 “when the amount of your outstanding accept-
 “ances not remitted for is to be reduced to 6000*l.*,
 “and thenceforth the sum to be annually reduced
 “2000*l.* until the whole be liquidated, which will
 “be at the end of the year 1812; until which
 “time, subject to the said annual reduction, this
 “guarantee is to remain in full force. And we
 “further undertake, that the amount of your en-
 “gagements, from time to time, shall be always
 “provided for by remittances in undoubtedly good
 “bills on bankers, or other equally good houses in
 “London, not having more than sixty-five days to
 “run; such remittances to come to hand at least
 “six days before your acceptances, for which they
 “are intended to provide, shall fall due. We are,
 “&c., (signed) Archibald Spiers, James Baird,
 “Peter Murdock, James Laird, James Alexander,
 “James Hill.”

Immediately after the establishment of this credit, Logan began to operate on the cash credit, by drawing bills at three months on Fraser and Company, which they accepted; and he provided for them by remitting bills in favour of Fraser and Company, agreeably to the letter of guarantee. In the current account, opened by Fraser and Company, they debited H. and R. Baird with the respective acceptances, and gave credit for the bills remitted.

On the 29th of December 1809, Fraser and Company wrote to Logan a letter, by which they informed him, that they had established a banking

concern, under the firm of "The Honourable Simon Fraser, Perring, Godfrey, Shaw, Barber, and Company:" that the company consisted also of J. H. Houston; and that the principal reason why his name did not appear in the firm, was, to preserve a more marked distinction between the banking concern and the commercial one, the firm of which, from and after the 31st of December, 1809, will be "The Honourable Simon Fraser, Houston, and Company." They also requested, that Logan thenceforward would draw on, and make his engagements payable with, the new firm; stating in the body of the bill, "value in account with Fraser, Houston, and Company," or F. H. and Co. They directed Logan to address to them as theretofore, with the difference only of the introduction into the firm of the name of Mr. Houston.

Accordingly, after the 31st December, 1809, Fraser and Company carried on business under the new name of The Honourable Simon Fraser, Houston, and Company, but without any change in the partners; and the banking establishment commenced under the firm mentioned in the letter.

No notice of this change was communicated to the sureties. From this period, Logan ceased to draw on Fraser and Company (or Fraser, Houston, and Company), but drew on the banking company the drafts bearing to be "for value in account as advised with Fraser, Houston, and Company," and these were accepted by the banking company. All his remittances were made directly to, and in favour of, Fraser, Houston, and Company.

On the 31st of December, 1809, Fraser and Company were under acceptances to Logan for 7130*l.*, which were payable in January, February,

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and March, 1810, and stood at the debit of H. and R. Baird. Remittances to that amount were made by Logan to Fraser, Houston, and Company, before the acceptances fell due, and were put to the credit of H. and R. Baird in the account current. The transactions were carried on in the same way till February, 1811, when H. and R. Baird became bankrupt.

Fraser died in 1811, leaving Houston the only surviving partner of the firm of Fraser Houston, and Co.

In 1812, Houston, as such surviving partner, brought an action against H. and R. Baird as principals, and the appellants as sureties, claiming by the conclusion of their summons a balance of 5739*l.* 11*s.* 7*d.*, as due on the cash account from the 31st of December, 1808, to April, 1811. The appellants, in their defences, objected, that the letter of guarantee did not extend to the transactions with the firm of Fraser, Houston, and Co., out of which the balance claimed in the action arose; and that the balance due to the firm of Fraser and Co., on the 31st of December, 1809, had been extinguished by subsequent remittances.

These defences were sustained by the Lord Ordinary (Meadowbank), who, upon the grounds assumed, gave judgment for the Appellant.

A reclaiming petition against this judgment was presented by the executors of Mr. Houston, who, acquiescing in the judgment as to the extent of the guarantee, contended, upon the question as to the application of the payments, that the account with Fraser and Company closed on the 31st of December, 1809, and that remittances made subsequent to that date could not be applied to the extinction

of the balance then due. This matter was remitted by the Court to an accountant, who made a report, in which he entered largely into discussion upon the question of law, as well as the statement of facts; and the Court of Session, on the 16th of December, 1825, "approved of the principles of "accounting adopted in the report; according to "which, the remittances of Mr. Logan to Fraser, "Houston, and Company are to be stated on the "dates of his making them, and his drafts on the "dates of his advising them."

The effect of this judgment was, to apply the remittances made after the 31st December, 1809, to the balance then due.

On the 12th of May, 1826, after a farther hearing upon cases submitted as to points undetermined, the Court of Session decerned and ordained that the appellants should pay to the assignee of Houston the sum demanded by the action, with interest, &c.

Against this Judgment there was an appeal to the House of Lords by the sureties, and a cross appeal by the assignee.

The following were the principal authorities cited: *Myers v. Edge*, 7 T. R. 254. *Weston v. Barton*, 4 Taunt. 673. See Fell. on Guarantees, p. 126, &c. *Wright v. Russell*, 3 Wilson's Rep. 530. 1 Bell's Com. 377. 2 Bell. Com. 237. *Devaynes v. Noble*, 1 Mer. Rep. 605. 6 Dow. 238.

On the 22d of May, 1829, the House of Lords reversed the judgment of the Court of Session; affirmed the judgment of the Lord Ordinary in the original appeal; and dismissed the cross appeal.

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(COURT OF SESSION.)

JOHN LEE ALLEN - - - - - *Appellant*;JAMES BERRY - - - - - *Respondent.*

Under a lease commencing at Whitsuntide, as to the natural grass lands, and as to the arable lands at the severing of the crops, the tenant being bound to consume the straw upon the land, and sufficiently to cultivate and manure them,—the tenant is entitled to the value of the dung made between Whitsuntide and harvest, and left upon the land; and the landlord having at Whitsuntide taken the straw upon the farm, which was no more than was requisite for foddering the cattle between that time and the severance of the crops, is bound to pay the value of it to the tenant.

THE appellant being owner of lands in the parish of Errol, and in the Carse of Gowrie, consisting of two farms, called Soan and Dalcally, granted a lease of those lands to the Respondent for the term of nineteen years, to commence in the year 1802, at Whitsunday, as far as related to the house and the natural grasses, and from the severing of the crops as far as related to the arable land. The Respondent, by the lease, bound and obliged himself “to consume upon the ground “the whole fodder that shall be raised thereupon,

“ except hay ; but the whole fodder of the last
 “ crop on the farm of Dalcally, notwithstanding
 “ the above restriction, he shall have liberty to
 “ dispose of as he shall think proper, saving
 “ always the landlord’s right of hypothec for the
 “ rent ; and, also, the said James Berry binds and
 “ obliges himself, and his aforesaid, to sufficiently
 “ cultivate, dung, labour, and manure the lands
 “ hereby set, and not to cross, crop, or in any
 “ ways waste or deteriorate the same, but on the
 “ contrary, to use all proper means for meliorating
 “ and improving the said lands.” It was also
 declared, that the Respondent should not be at
 liberty to lay any of the dung and straw remaining
 on the Loan farm after finishing the wheat seed
 of the last crop under this lease, upon any of the
 lands for the last crop, but that the whole of such
 dung and straw should be reserved for and de-
 livered over to the proprietor, or in-coming tenant
 at the time of their entry, without any consider-
 ation or recompense for the same.

The tenant having, at the expiration of his
 tenancy, claimed the value of straw taken by the
 Appellant at Whitsuntide, and the dung made be-
 tween that time and harvest ; after various pro-
 ceedings in the Sheriff’s Court and the Court of
 Session, judgment was given for the tenant.

The appeal was against this judgment.

The Lord Chancellor. — I think that your Lord-
 ships are entitled, from a consideration of all the
 circumstances of this case, and the shape the cause
 has taken from its outset, to assume, that this
 farm, independently of any question of law, was
 cultivated according to the course of husbandry

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in that district. No dispute or doubt has been raised on that point. Offers of proof were made, and the parties were not called upon to prove the fact. Independently of any positive rule or point of law, practically this farm was cultivated according to the rules of good husbandry in that district.

It appears to me, that during the nineteen years that the tenant, James Berry, possessed this farm, he pursued precisely the same course of cultivation which he adopted in the first year. He never laid at the spring time any manure upon the ground, except what was required for green crops, but reserved the manure for the wheat crop; because in that district the wheat crop is the crop to which the tenant looks for the payment of his rent, and it cannot be raised in that district without the proper application of manure. This course was followed during the nineteen years he continued tenant of this farm, without any complaint or any remonstrance from his landlord; and it appears, that in this district this is the uniform system of cultivation among those persons who are most competent to judge as to the proper cultivation of land. It appears, also, by referring to the lease, that as far as relates to the Loan farm, which is a farm of the same description, the landlord had expressly stipulated with his tenant, that, in the last year of the lease, no manure should be laid upon the farm in the spring, but that it should be reserved until the expiration of the term, in order that it might be handed over to the in-coming tenant to be employed for the wheat crop of the next season. We are to take it upon the statement of the facts and circumstances, as a point in the

cause, that, independently of any positive rule of law, the farm was well cultivated. Two questions have been raised, first, with respect to the straw ; secondly, with respect to the manure. If any straw had remained at the expiration of the tenancy, which had been the produce of the crop of the preceding year, or any of the preceding years, it would have become the property of the landlord, without his being required to make any payment, not from any rule of husbandry, but from the express stipulations of the lease ; because it is expressly provided, and in distinct terms, that all the fodder, except hay, shall be consumed upon the ground ; and if the tenant had neglected to consume any part of the fodder upon the ground, he could have no right afterwards to remove it, or to call upon the landlord to make a payment for that straw which ought to have been so expended. He could not have profited in this respect from his own wrong. I am speaking of any straw that remained at the expiration of the tenancy.

With respect to the manure, that is subject to a different consideration. There is no stipulation in the clause with respect to the manure. It is not required in terms that the manure shall be laid upon the land in the last year of the tenancy, it is not required in terms that it shall be made use of for the spring seed ; that it should be laid on the bear land, to make use of a Scottish term, as applicable to this subject. The only stipulation applicable to the manure is this, “ The tenant binds himself to cultivate, labour, and manure the land properly, and according to the rules of good husbandry.” There is no other stipulation with respect to the manure. But it is contended in the first place,

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that from the stipulation with respect to the straw, if the manure be not expended upon the land in the last year of the tenancy, it becomes the property of the landlord, because it is said the stipulation, with respect to the straw or fodder, that it shall all be consumed upon the farm, is a stipulation for the benefit of the landlord, and as the landlord can only profit by the circumstance of the fodder being consumed on the land, and converted into manure, that therefore it is clear that he is entitled to the manure without paying for it. This species of argument was adopted by one of the learned Judges in the court below, but I think that the inference does not follow. In this particular district, the Carse of Gowrie, if the manure were removed from the land, the consequence would be that the succeeding tenant would not be able to raise a crop of wheat in the succeeding year, because it would be impossible, except at a most enormous price, to bring to the land sufficient manure for that purpose.

If, therefore, it be a stipulation in the lease that the fodder shall be consumed upon the land, and if the landlord has an opportunity of purchasing that manure, he will from that circumstance derive a most important benefit, because, by making that purchase, he will be in a condition to raise a wheat crop in the succeeding year. It is not necessary, therefore, to infer from the stipulation with respect to the fodder, that the manure becomes the property of the landlord without payment. It is sufficient to say, that that stipulation is beneficial in another shape; namely, that the manure is ready produced, and that the landlord has an opportunity of taking it at a valuation. I think, therefore,

that no argument, or at least no satisfactory argument can arise in consequence of the stipulation to which I have adverted, and which was insisted upon in the court below, in respect of the regulation as to the fodder.

But it is said, that by the common law of Scotland, the manure which is provided between the wheat seed-time and the bear seed-time, must be laid upon the land at the bear seed-time; and the case of *Finnie v. Trotter** has been cited for the purpose of establishing that proposition. The case of *Finnie v. Trotter* is by no means conclusive on this point. I do not think that the argument built upon it applies to the present question. In that case, the farm was of a very different description. It was a farm called Swanston, in the neighbourhood of Edinburgh, upon the Pentland Hills, the nature of the soil of which is widely different from that of the Carse of Gowrie; and that which might be very good husbandry in the Carse of Gowrie might be very bad husbandry in the Pentland Hills, and *vice versa*. It was observed by one of the Judges in the court below, that, in the case of *Finnie v. Trotter*, no offer was made to prove in the proper stage that the tenant had cultivated the farm in a course of good husbandry, but that he made that offer in a subsequent stage, and the landlord did not assent to that offer. It does not appear, therefore, that the treatment of the land in that case was according to good husbandry; and again, it was a steelbow farm as far as related to straw. The straw was, therefore, the property of the landlord, and if that straw were converted into

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* Dict. of Decis. (15,260.)

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manure, that manure would equally become the property of the landlord. The case of *Finnie v. Trotter*, arising on a steelbow farm, cannot be applied to this, which is not a steelbow farm, and where the straw is not the property of the landlord, but he has only a right to that which shall not be consumed upon the farm. The case of *Finnie v. Trotter* does not, therefore, appear to me to govern this decision.

Two other cases were referred to : *The Earl of Wemyss v. Wright* *, and *Forrester v. Wright*.† In my opinion they have no application to the present question ; because, in the case of the Earl of Wemyss, there was a distinct and express stipulation that the manure should be laid upon the ground. There was, also, a similar stipulation in effect in the case of Forrester ; and, therefore, whatever might be the rules of good husbandry, that question did not arise in either of these two cases, because the parties were bound by their express and positive stipulation.

It appears to me, therefore, that there is nothing whatever to shew that there is throughout Scotland an universal rule, considered as the common law of Scotland, that in all cases the manure which has been made subsequently to the period of wheat seed in autumn, is to be applied for the purpose of raising the spring crops ; and I apprehend that the law of Scotland must, according to all common sense, be in that respect like the law of England. The rule must differ according to the particular district, and the nature of the soil ; and all that could be required of the tenant, is, that he

* Fac. Coll. June 16. 1801.

† Id. Feb. 19. 1808.

should cultivate the grounds according to the rules of good husbandry, that being regulated by the nature of the soil of which the farm consists.

Now, the stipulation in the lease as to the manure was merely that the tenant should "sufficiently cultivate, dung, labour, and manure the lands let to him, and not to cross, crop, or any way deteriorate the same, but on the contrary, to use all proper means for meliorating and improving the said lands." According to the evidence in the cause, it appears to me, that if he had laid the manure upon the land at bare seed-time, he would not have cultivated his land according to a course of good husbandry; and that it was incumbent upon him to omit laying the manure upon the land at that time, in order that there might be a sufficient supply of manure for the purpose of raising a wheat crop the subsequent season. I agree, therefore, with the majority of the learned Judges of the court below as to the principle on which they have decided this part of the case.

With respect to the straw, it was provided in the lease, that all the straw should be consumed upon the farm; and if any straw, therefore, had been left at the expiration of the lease, undoubtedly the tenant would not have been entitled to be paid for it. But the lease, as far as it regards the house and the natural grasses, terminated at Whitsunday; and, as far as it relates to the arable, it did not terminate until the severance of the crops. Before the termination of the lease, the landlord insisted upon taking possession of the manure and the straw; and he was allowed to take possession of the manure and straw, upon a valu-

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ation being made, and upon a security being given. Now the sheriff has found, that there was no more straw upon the farm at that time than was requisite for the foddering of the cattle up to the period when the lease expired, on the severance of the crops. The tenant, therefore, was entitled to have retained possession of that straw for the purpose of foddering his cattle during the interval; and, according to what I have stated, if he had done so, the manure would have been his property: it follows, therefore, as a necessary consequence, that if the landlord chose to take possession of that straw at Whitsunday, and to convert it to his own use, he is bound to pay the value of it. Upon both of these points, therefore, which have been considered as very important by the Judges in the Court of Session, the judgment of the Court of Session ought to be affirmed.

Judgment affirmed, with 100*l.* costs.

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(COURT OF SESSION.

BENNET - - - - - *Appellant ;*M'LACHLIN - - - - - *Respondent.*

The adjudication under the Scotch Bankrupt Act, 54 G.3. c. 137., operates as diligence for the creditors of the ancestor, so that it is unnecessary for them to take any proceeding under the statute of 1661, to give them a preference over the creditors of the bankrupt heir.

BEFORE the year 1811, John Crawford and his sons carried on business at Port Glasgow as merchants, in the name and firm of John Crawford and Co. In the year 1811, John Crawford went out of the firm, and died in 1813. The business was continued by his eldest son, James Crawford, in partnership with his two brothers, in the name of the old firm of John Crawford and Company. In the year 1816 John Crawford and Company became bankrupt, a sequestration was issued, and the Appellant was appointed and confirmed trustee, both with respect to the estate of the partnership, and also with respect to the estates of two of the individual partners.

John Crawford at his death was indebted to a large amount, and he left a considerable estate. James Crawford was the heir of his father John Crawford, and in a settlement made by John Craw-

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ford, James was directed to make up titles to the estate, which was to become the property, in certain proportions, of James Crawford, and the other sons of John Crawford. Those titles were partly made up, but the debts of the father were not paid. There was a very large claim remaining unsatisfied at the time of the bankruptcy.

By the law of Scotland, founded on an act passed in the year 1661, as between the creditors of the heir and the ancestor, a preference is given against the ancestor's estate in favour of those persons who were creditors of the ancestor, upon condition that diligence be done within a period of three years.

A question arose between the creditors under the bankruptcy, and the creditors of the ancestor, who had not, as it was contended, completed their diligence within the period of three years from the date of his death, and thereby, as the Appellant insisted, lost their preference.

The judgment below was in favour of the creditors of the ancestor. The trustee for the creditors under the bankruptcy appealed to the House of Lords.

Authorities cited : 3 Ersk. 101. 1 Bell's Com. 729. M'Kenzie's Obs. 394. 2 Stair 2. 29. and 4. 35. 16. 3 Bank. 5. 67. Bellenden, March, 1685, 3127. Taylor, December 9. 1747. Arniston, March 16. 1686. (2 Supp. 92.)

The Lord Chancellor. — The question in this case arises out of the 54 G. 3. c. 137., respecting the sequestration of bankrupts' estates in Scotland. Under that act there is a general adjudication directed against the whole property of

the bankrupt, and the question is, whether that general adjudication embraces within it the property of the ancestor, so as to render it unnecessary for the creditors of the ancestor to go on and complete diligence within the time limited by the act 1661. It is convenient that such a construction should be put upon the act 54 G. 3., because, in the first place, it tends much to diminish the expense of the proceedings. The creditors of the heir would have the benefit only of the surplus of the ancestor's estate, after the debts of the ancestor are discharged, and therefore it seems very much for the benefit of the general creditors of the heir, that as little expense should be incurred in settling the ancestor's debts and the distribution of his estate as possible. If each creditor of the ancestor is to do separate diligence, the consequence will be, that very considerable expense will be incurred, and that expense so incurred will so far tend to the diminution of that surplus, the benefit of which will ultimately belong to the general creditors of the heir. In the next place, a different construction would tend materially, in many instances, to delay, because, instead of enabling a trustee almost immediately to distribute the estate, it would be necessary to wait until the period of three years had expired, for the purpose of ascertaining what the surplus would be. That state of law would be attended with inconvenience, and, on the other hand, it does not strike my mind that there is any corresponding convenience.

But this case must be governed by the construction of the 54 G. 3. c. 137. By the 15th section of that act, it is declared, that the great object of the act is, as expeditiously as possible to distri-

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bute the effects of the bankrupt, without abiding the ordinary forms of law; and accordingly, by summary petition to the Court of Session, sequestration is immediately awarded. According to the provisions of the 29th section, all the property of every description belonging to the bankrupt, is to be transferred to the trustee. If the bankrupt will not assign the property, it becomes vested in the trustee, for behoof of creditors by operation of law (section 30.); and it is declared, that the whole of the property so transferred, shall be for the behoof of the whole of the creditors. But the property which comes to the heir from his ancestor, is a part of the property of the bankrupt. When, therefore, the act of parliament provides that all the property shall vest in the trustees, for the benefit and behoof of all the creditors, it seems that it comprehended the estate which had belonged to the ancestor, as well as that particular property which did not belong to the ancestor, but belonged to the heir originally.

In a subsequent section, the property which the heir takes as "apparent heir" is distinctly adverted to, so that the attention of the legislature appears to have been directed to the particular subject.

The act provides, that "in case the bankrupt's
 "own titles to any part of the estate, heritable or
 "moveable, real or personal, which belonged to him
 "at that period, or to which he had then succeeded
 "as apparent heir, nearest of kin, or otherwise, to
 "any predecessor, have not been so completed as
 "to vest the right properly in him, the trustee shall
 "take the most safe and eligible method of com-
 "pleting the bankrupt's title, in such way and man-
 "ner as the law requires, declaring always that the

“ rules of preference or ranking between the creditors of the ancestor and those of the heir by the law of Scotland, are not meant to be altered by any thing contained in this act.” It does not say that the course of proceeding with respect to this preference is not to be altered, but merely that the rules of preference, or ranking between the creditors of the ancestor and those of the heir, are not meant to be altered by the operation of the act, so that the whole property is conveyed for the behoof of all the creditors; and then to prevent any inference which might be drawn, tending to the conclusion that the creditors of the ancestor were meant to be affected by the act, the clause to which I have adverted is inserted, stating that the rules with respect to the preference between the creditors of the ancestor and those of the heir are not meant to be altered.

In the 42d section, it is distinctly provided, that “ no other adjudication led or made effectual after the date of the first deliverance aforesaid, shall have any effect in competition with the right of the creditors under the sequestration.” So that it is clear, that in the general adjudication, the first adjudication is the adjudication that is to affect the whole property, and no other shall have any effect, &c., thereby in effect enacting, that no proceedings whatever are to be carried on for the purpose of obtaining an adjudication by those persons who are creditors of the ancestor.

Taking all these clauses together, I cannot bring my mind to entertain any degree of reasonable doubt as to the intention of the legislature. I have adverted to the other sections of the act which were alluded to during the argument, but

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it appears to me that there is not one of them that is not reconcileable with the view of the subject which I have taken. I do not mean to say that some degree of doubt and some degree of uncertainty might not have rested on those other sections, if taken separately, but the whole must be construed together; and the sections to which I have adverted, appear to me to speak in a clear and distinct language, and, I think, may be reconciled with the other sections to which I before adverted.

It was stated at the bar, and correctly stated, that there had been a decision contradictory to that against which this appeal has been lodged; but that case is open to this observation (I mean the case of the Blair bond), that this question was not there raised before the Court. It was considered by the parties on both sides (although the point was open), I suppose for their mutual interest, that it should be waived. But, certainly, the point was never argued; and, therefore, that decision, although in its terms at variance with the decision to which the Court of Session has since come, can hardly be considered as possessing much weight with respect to the present question.

There were other subordinate points in the case to which it does not appear to me to be necessary to advert. The main question was that to which I have called your Lordships' attention. The judgment of the Court of Session is correct, and ought to be affirmed.

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SCOTLAND.

(COURT OF SESSION.)

ALEXANDER RITCHIE - - - - - *Appellant* ;
JOHN MACKAY - - - - - *Respondent*.

J. R. being the drawer, and A. R. the acceptor of a bill of exchange, upon which the money due was paid by M., and the bill assigned to him, an action having been brought by him against A. R., the acceptor, to recover the amount paid; and A. R. having proposed a reference to the oath of J. R. as a party, to prove that no consideration was given for the bill: Held, that the Court of Session, under the circumstances, having a discretion, properly refused to permit such reference.

If J. R. had been the plaintiff in the action, *semble*, that he might have been examined at the instance of the defendant. A person rendered infamous by conviction of a crime is not, by the law of Scotland, restored to competency as a witness by having suffered the punishment, nor otherwise than by a pardon from the crown.

THE Appellant, in March, 1817, accepted a bill drawn upon him by James Ritchie. The bill was discounted by the drawer with the Commercial Banking Company, and fell due on the 17th of June, 1817, when it was dishonoured. On the 18th of August, he conveyed all his estate and effects to a trustee for his creditors, and endeavoured to take the benefit of a *cessio bonorum*. In November, 1817, the Respondent paid the amount due upon the bill; and having taken an assignment of it from the bank, proceeded against the

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Appellant as the acceptor. The Appellant thereupon filed a bill of suspension, and prepared to prove, by the oath of James Ritchie the drawer, that no value had been paid for the bill.

In 1818, James Ritchie was convicted in the Court of Justiciary of fraud, falsehood, and wilful imposition, and sentenced to imprisonment. Upon the ground of this conviction, and the insolvency, and also that James Ritchie was brother of the Appellant, an objection was made to the reference to the oath of James Ritchie. The Court of Session, adopting the judgment of the Lord Ordinary, found the examination incompetent.

Against this judgment, there was an appeal. Upon which the Lord Chancellor advised as follows : —

The Lord Chancellor. — The circumstances under which this bill found its way into the possession of the Respondent, were such, as to render it material to ascertain whether or not there was value given by James Ritchie to Alexander Ritchie for the acceptance.

Upon the face of the bill it appeared, that it was accepted for value, and there was no written document in the possession of Alexander Ritchie to oppose what appeared upon the face of the bill. It was contended, however, on the part of Alexander Ritchie, that he was entitled in this case to have the benefit of the drawer's oath; a reference was made in the usual way to the oath of the drawer, and the question turns entirely upon that reference, under the particular circumstances to which I am about to advert.

This transaction took place in the year 1817. Shortly afterwards, a proceeding was instituted

against James Ritchie, the drawer of the bill, in consequence of certain fraudulent transactions in which he had been concerned. James Ritchie had negotiated in Scotland two several bills, with fictitious names upon those bills, which, according to the law of England, would be forgeries. He was concerned in uttering those bills in Scotland, knowing that the names were the names of fictitious persons, and thereby committing a gross fraud. He was prosecuted for the fraud he had so committed, found guilty, and sentenced to one year's imprisonment; and it was contended, under these circumstances, on behalf of the Respondent, that it was incompetent to make a reference to the oath of James Ritchie; that he was, in consequence of these circumstances, and of his conviction of this fraud, rendered incompetent as a witness in a court of justice, and incompetent, also, to have an oath tendered to him for the purposes to which I have adverted. It was contended, on the other side, that the offence was not to be considered as a *crimen falsi*; and that, even if he would in the first instance have been rendered incompetent, still, by having undergone the sentence of the law, his competency was restored. These were the points in controversy.

With respect to the first question, no reasonable doubt can be entertained; that the offence of which he was guilty, ranged itself under the denomination of the *crimen falsi*. It was, in the true sense of the word, a forgery. He knew the names to be fictitious: he issued the bills knowing that the names were fictitious; he issued them for the purpose of fraud, and he consummated that fraud. It is impossible that an instance more strong, as

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ranging itself under the denomination or description of the *crimen falsi*, could be mentioned. Upon that point, therefore, it appears to be impossible any doubt can be entertained.

The next question for consideration is, whether, as he has undergone the sentence of the law, his competency is restored? According to the law of Scotland, I understand the disqualification to be perpetual, unless it is removed by a pardon from the crown. It was so decided in the year 1815, in a case reported in the Faculty Collection, the case of *Black v. Brown*; which case afterwards came under the consideration of Lord Pitmilley in the year 1825, and he recognised and adopted that decision. No contrary decision is to be found; and I think we are entitled to assume, that, according to the law of Scotland, the mere circumstance of the party having gone through the punishment imposed upon the crime, does not remove his disqualification, and that it can be removed only by a pardon from the crown. Under these circumstances, therefore, if James Ritchie had been tendered as a witness, I apprehend it is perfectly clear that he would have been incompetent; that his testimony, as a witness, would not have been received.

But in this case he was not tendered as a witness; I beg now, therefore, to suggest that I entertain very great doubt as to whether or not an objection of this kind can be made as a general objection, where a reference is made to the oath of the party.. I shall take this in its most simple form. I shall suppose this to have been a proceeding in which Ritchie, the drawer, was the Plaintiff in a suit against Alexander Ritchie, the

acceptor; it does not appear to me that there is any sufficient reason, under such circumstances, and in that state of facts, to say that Alexander Ritchie, the Defendant in such a suit, would have been deprived of a right to make his appeal to the oath of the Plaintiff, merely because the Plaintiff had become incompetent as a witness between third persons, in consequence of his having been convicted of the *crimen falsi*. There is no authority that has been cited for the purpose of establishing such a position, and I see no ground upon which it can be rested, as between two parties in a court of justice who are contending against each other. It does not appear to me that there is any reason why, because one person has committed a crime which would render him incompetent to give evidence, the other should be deprived of the benefit the law gives him, if he chooses to avail himself of the benefit of resting his case on an appeal to the oath of his adversary. It is true that the appeal, under such circumstances, is not likely to be advantageous, but that is for the consideration of the party making the appeal: and in the absence of authority I should say, in that state of facts to which I have adverted, namely, where one of the litigating parties in the suit was a person who had committed a crime, and whose incompetency as a witness was declared, his adversary would not be deprived of the right of appealing to his oath. The only ground which has suggested itself to me for sustaining such an objection is, that a court of justice, under such circumstances, might think they ought not to tender an oath to a party who had become infamous in consequence of the conviction of a crime.

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A similar rule of law applies in this country as to the evidence of persons convicted of certain crimes, who are thereby rendered incompetent witnesses in a court of justice. But there are many cases in which an oath may be tendered to a party so situated, not an oath to him as a witness, but an oath under other circumstances. It does not appear to me, therefore, in this situation of things, that if James Ritchie had himself been the Plaintiff in the suit, it would have been incompetent to Alexander Ritchie to put him to his oath. But that is not the state of things in this case. It is observed by the Lord Ordinary, in giving his judgment, that it is in a considerable degree in the discretion of the court, whether or not they will allow the oath to be tendered; and I find, on referring to Mr. Bell's book * upon the same subject, he also lays it down as the law of Scotland (which I believe cannot be questioned), that it is not imperative upon the court, under all circumstances, to allow the oath to be put, but that the court, this being an appeal to the equitable consideration of the court, has a right to exercise a discretion upon the subject, and if they see reason to believe that justice is likely to be perverted by the administration of an oath of that description, they will not give authority for the oath to be administered.

In order that I may not be mistaken with respect to this doctrine, I will refer to the language of the Lord Ordinary, to which I beg leave to say that, on consideration, I entirely subscribe. He says, "It is in consequence of the equitable powers of the court, that they permit any oath

* 1 Bell's Comm. 253. and see *id.* 2. 5.

“ of reference to be taken, for in strict law a bill
 “ is evidence of a debt, but where the court has
 “ just reason to apprehend that truth will not be
 “ obtained by such an oath, it has, in many cases,
 “ refused to permit the oath to be taken.”

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Now let us consider what is the situation of the parties in this case ; James Ritchie is a bankrupt, — a bankrupt under such circumstances, that he has a mere nominal interest in the success of the pursuer in this action. It is obvious, therefore, that if the oath is tendered to him, he stands substantially in the situation of a witness, — he stands substantially, and gives his evidence almost in the character of a witness ; not in the situation of a witness in strict law, but in that situation in point of effect. He stands also in the relation of brother to the party who claims the benefit of his oath, in addition to which, he is wholly unworthy of credit, in consequence of the conviction of the crime of which he has been accused. Under those circumstances, referring to the doctrine to which I have adverted, I think that the Court would exercise a sound discretion, in a case of this description, in saying, that Alexander Ritchie ought not to be permitted to rest the case on an appeal to the oath of his brother.

The result of what I have stated will be in substance to affirm the judgment of the Court below. The only doubt that has occurred to me, has been with respect to the terms in which that judgment has been pronounced. The judgment of the Court below is in these terms : — “ In respect that James
 “ Ritchie was convicted, and received sentence
 “ for a crime which rendered him infamous, find,
 “ that the proposed reference to his oath is incom-

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“petent, and remit to the Lord Ordinary to proceed accordingly, and to determine all questions as to expences.” Substantially, I should recommend to your Lordships to affirm the judgment, but I am apprehensive, if it is affirmed precisely in the form in which that judgment is pronounced, it may be considered that the Court below meant to lay down as a general rule, and that this House has concurred in the opinion, that where a party has been convicted of a crime which renders him infamous, under no circumstances, and between no parties could reference be made to his oath; and, I apprehend, your Lordships would not be disposed, at least unnecessarily, for it is unnecessary to the decision of this case, to lay down such a doctrine. For the purpose of avoiding such a conclusion being drawn from the terms in which this judgment is pronounced, although I should recommend to your Lordships to affirm the judgment in substance, I should suggest, at the same time, that some alteration should be made in the terms in which the interlocutor is conceived.

June 24, 1829.

It is declared, that this House does not think it necessary for the decision of this case, to determine whether, by the law of Scotland, reference to the oath of a party is incompetent, by reason of his having been convicted, and having received sentence for a crime which renders him infamous, and would render him incompetent as a witness; but the Lords find, that under the particular circumstances of this case, such reference was properly refused, and it is therefore ordered and adjudged that the interlocutors complained of be affirmed.

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THE COMMERCIAL BANK OF
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SCOTLAND.

(COURT OF SESSION.)

THE COMMERCIAL BANK OF SCOT-	} <i>Appellants ;</i>
LAND	
POLLOCK	<i>Respondent.</i>

By the draft of a contract originally made between a joint stock company and their manager, it was provided that the manager shall not be removed without the concurrence of the whole committee of management, and that upon removal he shall receive such compensation as the committee shall adjudge, but the contract was not signed. A new contract was afterwards signed, by which the manager was removeable by a majority consisting of two thirds of the committee; in which new contract there was no provision for compensation upon removal.

The manager was removed by a vote of two thirds of the committee: Held, that the removal was valid, and that no compensation could be recovered, either under the contract or by implication of law.

IN the year 1810, a number of persons associated themselves together for the purpose of forming a bank at Edinburgh, which bank was distinguished by the name of "The Commercial Bank of Scotland." They applied to Mr. Pollock (who was at the time a writer to the signet, carrying on business in partnership with a person of the name of Campbell, as law agents in Edinburgh), to assist

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them in forming this establishment, and to hold the office of manager when the establishment should be complete. Mr. Pollock assented to the proposal. He acted in the formation of this company, and a treaty was carried on for the purpose of ascertaining and fixing the nature of the office he was to hold in the establishment, and the amount and extent of remuneration he was to receive.

A contract was entered into, drawn by Mr. Pollock, which, so far as it related to Mr. Pollock's situation, was in these terms: "And as the said John Pollock has been invited to relinquish his professional connection and prospects to accept of the said situation, he shall, in case of his removal or resignation, receive from the company during his life-time, such annuity or annual allowance as the committee of management for the first year, or any succeeding years, shall fix, by a minute in the sederunt book, and when so fixed, the same shall be equally binding: and the said John Pollock shall not be removeable from the said situation, unless the whole other members of the ordinary committee of management for the time being shall concur in a motion for his removal." That instrument was not signed by all the partners; and many objections being made as to parts of this partnership deed, and in particular to that part of it which related to Mr. Pollock, the deed was ultimately abandoned, and instead of it a new partnership deed was executed, containing the alterations which were intended to be introduced.

That part of the new partnership deed which relates to Mr. Pollock's office and remuneration, is in these terms: — "The manager must be pos-

“sessed of at least forty shares of the capital stock
 “of the company, and shall receive such yearly
 “salary or allowance from the company, as shall
 “be fixed and regulated by the committee of
 “management for the time being, and the said
 “John Pollock is hereby appointed the first ma-
 “nager. On the removal, or resignation, or death
 “of the said John Pollock, all future managers
 “shall be nominated and appointed by the ordi-
 “nary committee of management for the time
 “being ;” and then a stipulation is made as to the
 amount of shares which any future manager is to
 hold. It then goes on thus: “and no manager
 “shall be removable, unless two thirds of the
 “ordinary committee of management for the time
 “being, shall concur in a motion for his removal.”

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This contract of partnership was completed and executed by all the partners, and among the rest by Mr. Pollock the manager.

Mr. Pollock, in pursuance of this agreement, entered into the discharge of the duties of his office, and continued for some time to perform them.

The committee of management, not being satisfied with his conduct, removed him by a resolution of two thirds of their number.

The Respondent thereupon brought an action in the Court of Session, seeking to be reinstated in his office, to recover arrears of salary, and for damages. He also instituted proceedings against the Appellants for a conspiracy.

The Court adjudged that the Appellants had power to remove the Respondent, but not without sufficient cause, and that no such cause had been proved, and that the proceedings as to the conspiracy were unfounded.

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Against this judgment the Appellants and Respondent respectively appealed.

The Lord Chancellor. — There is no doubt that the Respondent was removed with the concurrence of two-thirds of the committee of management, and this was approved by the proprietors in general.

Mr. Pollock contends, in the first place, that they had no power or authority to remove him, and in the next place, that if they did remove him, they were bound to make him compensation for the loss and injury he thereby sustained. Now it is quite obvious that this must depend upon the terms of the contract. He was the servant of the company, and in order to ascertain whether or not he was liable to be removed by the company, and if so, under what circumstances, and upon what terms we must refer to the contract.

It appears to me to be absolutely impossible for a moment to assert that the company had not a right to remove him, because, even in the first contract to which I have adverted, and which was drawn by Mr. Pollock himself, it is expressly provided, "that the said John Pollock shall not be removable from the said situation, unless the whole other members of the ordinary committee of management for the time being, shall concur in the motion for his removal." He was, therefore removable under the first contract, provided all the members of the committee of management concurred in the propriety of his removal. Under the second contract, so far as related to his removal, the only alteration that was introduced was this: "And no manager shall be removable, unless two-thirds of the ordinary committee of management for the time being, shall concur in a motion for

“his removal.” So that under the first contract, he was liable to be removed with the unanimous concurrence of the committee of management. Under the second contract, he was liable to be removed if two thirds of the committee of management concurred in his removal. It appears to me therefore impossible to contend for a moment that he was not liable to be removed. The court below decided clearly that he was liable to be removed.

The next question is, whether he is entitled to any compensation in consequence of his having been removed? That must depend upon the terms of the contract. I do not find in the contract any definite stipulation in this respect, except what is contained in the original deed of contract. There I find, that “in case of his removal or resignation, “he shall receive from the company for his ‘life-
“time, such annuity or pecuniary annual allow-
“ance, as the committee of management for the
“first year, or any succeeding years shall fix, by
“a minute in their sederunt book.” This was an article prepared by Mr. Pollock himself, who was at that time acting as the adviser of the company, who assisted in forming these articles of partnership, and undoubtedly if they had continued to be the subsisting contract between these parties, Mr. Pollock would have been entitled, in the event of his being removed from the office, to call upon the committee of management to hold a meeting for the purpose of fixing the amount of the remuneration he was to receive in the shape of retiring provision; but that contract was entirely done away with by the subsequent contract.

It appears, that the situation and circumstances

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of the office held by Mr. Pollock were a subject of consideration at the time when objections were made to the original contract. A new contract was formed, and in the article relating to Mr. Pollock, where it is stated that no manager shall be removed unless two third parts of the ordinary committee of management for the time being shall concur in the measure of his removal, I find no stipulation whatever, no clause whatever, entitling Mr. Pollock to the benefit of any compensation, or any retiring provision in the event of his being removed. I find, therefore, no subsisting contract which entitles Mr. Pollock to a compensation. In the absence of any subsisting contract, it appears to me that he can have no claim in point of law to any compensation, if he is removed by the committee of management.

Taking, then, the whole of these circumstances together, and considering what the nature of the contract was between these parties, it appears to me clear that the committee of management had an absolute discretion to remove Mr. Pollock when they thought proper; that they were not responsible for the manner in which they exercised that discretion, and that they were not bound to make any compensation or remuneration to Mr. Pollock for the loss he sustained in that removal; Mr. Pollock appears to have placed himself at their discretion. He had this security, and it was his only security, that having been once appointed to that office, he could not be removed from it unless two thirds of the committee of management concurred in the propriety of his removal. If two thirds of the committee of management did concur in the propriety of his removal, it appears to

me that he was, in point of law, legally and effectually removed from the office, and that he has no claim for compensation.

It is the more important to advert to what appears upon the articles of partnership, from the consideration that this was a company, the shares of which were assignable; and any person purchasing a share, would look at the articles of partnership for the purpose of knowing in what situation he stood, and what were his obligations; and, therefore, it was natural to expect, indeed it was proper, for the purpose of guarding against imposition and fraud, that the precise terms of the regulation should appear on the partnership deed; and such appears to have been the understanding between these parties.

I am of opinion, therefore, that the judgment of the court below was correct as far as relates to the decision, that Mr. Pollock was removeable at the discretion of two thirds of the committee of management; but they went too far in holding, that he was entitled to compensation in the event of his removal. As far as relates to the former part of the judgment, it should be affirmed; and it should be reversed as far as relates to the latter part of it.

With regard to the cross appeal there is not sufficient ground to make out the charge of a conspiracy.

The Lords found, as to the interlocutor complained of in the original appeal, that the Defenders had authority at their own discretion to remove the manager from his office, and affirmed the judgment so far as it was consistent with that finding, and reversed it so far as it was inconsistent with it, and the cross appeal was dismissed. 20th June.

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 DOWNE
 v.
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SCOTLAND.

(COURT OF SESSION.)

DOWNE, BELL, and MITCHELL - - *Appellants.*PITCAIRN and Others - - - - *Respondents.*

M., a partner with D. and B., acted as agent for P. and Co. till 1809; at which time a balance was due to M., and bills accepted by him were outstanding, and afterwards paid by the firm in which he was a partner. D., B., and M. were appointed under a special contract, and acted as agents for P. and Co., from the time when M. ceased to be their agent, in 1809, until 1814. In taking the account between P. and Co., and D., B., and M., held that the accounts between P. and Co. and M. were properly excluded; and that as these accounts were not liquidated, nor capable of immediate liquidation, a debt from P. and Co. to M. could not be allowed in compensation (set-off) against a debt or balance owing from D., B., and Co. to M., if such debts could at all, by the law of Scotland, be set off against each other.

Charges by an agent for printing documents, the effect of which is to save his personal labour in writing, ought not to be allowed in account with his principal.

A judgment ought not to be varied, nor a cause remitted, on account of improper charge of interest upon a balance, if it is of trifling amount. Especially if there is an omission to charge interest upon balances on the other side of the account.


THE Respondents, a firm of ship-owners, who traded under the name of the Edinburgh and Leith Shipping Company, were established in Edinburgh

in the year 1802. At that period, Messrs. Downe and Company carried on the business of wharfingers in London, and the London and Edinburgh Shipping Company addressed their vessels to the wharf of Messrs. Downe and Company, having appointed Mr. Bell, who was a partner in that house, as their agent for the purpose of managing their shipping concerns. It was the business of Mr. Bell, as such agent, to collect the freights, and do the other business connected with an agency of this description. Mr. Bell continued to transact this business till 1807, when, in consequence of some pecuniary embarrassments of an establishment with which he was connected, he retired from the agency, and the Respondent, Mr. Mitchell, was appointed to succeed him. Mr. Mitchell was at that time a clerk in the house of Messrs. Downe and Company. In the beginning of the year 1809, Mitchell became a partner in this house, and continued to act as agent up to the month of October 1809. Mitchell, before he gave up the agency, had accepted bills to the amount of 2200*l.*, drawn upon him by the Respondents on account of freights received or expected to be received. These acceptances, the greater part of which fell due after the date of the agreement after-mentioned of 1809, were paid, as it was alleged, by the Appellants. It was also alleged, that there was a balance of 100*l.* and upwards due from the Respondents to Mitchell, which was paid to him by Downe, Bell, and Mitchell; and that in the account between the Respondents and Mitchell, credit had been given for a sum of 450*l.* and upwards, which had not been received by Mitchell. In the month of October 1809, upon a new arrangement, a contract was executed

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between the Edinburgh and Leith Shipping Company and the firm of Messrs. Downe, Bell, and Mitchell. The Respondents, by that contract, engaged, that for the period of seven years the vessels of the Edinburgh and Leith Shipping Company should be addressed to the house of Downe, Bell, and Mitchell; and that, during the same period, the house of Downe, Bell, and Mitchell should act as agents for the Edinburgh and Leith Shipping Company. They accordingly commenced their new agency from the date of the agreement. The agency continued up to February 1814; when, some disputes having arisen between the Edinburgh and Leith Shipping Company and Messrs. Downe, Bell, and Mitchell, the vessels were no longer addressed to their wharf, and the agency entirely ceased. In consequence of this alleged breach of contract, Messrs. Downe, Bell, and Mitchell instituted some proceedings in the Court of Session against the Edinburgh and Leith Shipping Company; and the Shipping Company, on their side, instituted in the same Court a suit of count and reckoning against Messrs. Downe, Bell, and Mitchell, for the money they had received in their character of agents. The question was referred to an accountant, who took the accounts upon the foot of the agreement of 1809, excluding all transactions prior to that agreement, and proceeding upon that principle, reported that a balance of 850*l.* was due from the wharfingers to the Shipping Company, and he charged them with interest upon that sum from the time when the agency ceased. It appeared, however, that freights to the amount of 1200*l.* were outstanding at that period. On the other hand, it

appeared that balances to a considerable amount had remained in the hands of the Appellants during the period of the agency. A charge made by the Appellants for printing carriers' tickets was also disallowed by the accountant. Objections being made to the principle upon which the account was taken, and to other matters in the report, it was brought under the review of the Lord Ordinary, and was confirmed. The subject was then brought under the review of the Court of Session, who confirmed the judgment of the Lord Ordinary. It was against these judgments that this appeal was preferred.

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The Lord Chancellor. — The principal object to which I think it necessary to call the attention of the House, is with respect to the previous account of Mr. Mitchell. Mr. Mitchell was the agent who immediately preceded the agency of Messrs. Downe, Bell, and Mitchell. It was stated, and is alleged in these papers, that in that account between Mr. Mitchell and the Shipping Company, credit had been given for a sum of 450*l.* and upwards, for freights which had never been received by Mr. Mitchell. It was contended, therefore, that that sum of 450*l.* should be deducted from the balance which had been found due to the Shipping Company from Messrs. Downe, Bell, and Mitchell. The accountant and the court below were of opinion that no such deduction should be made in this case; that this was a suit brought in respect of transactions under a particular contract, commencing at a particular date, between particular parties, and that they had nothing to do with previous transactions between the Shipping Company and Mr. Mitchell. On the

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other hand, it was contended that this account, commenced after the agreement had been entered into, was nothing more than a continuation of the old account, and that they were so blended together that they could not separate the one from the other, and that it would be doing great injustice to the parties if they were to commence the account in the manner the accountant had commenced it at the period of October 1809. For the purpose of showing that the two accounts were blended together, they relied principally upon this circumstance:—Mr. Mitchell, before he had given up the agency, had accepted bills to the amount of £2000; he had accepted bills on account of freights that had been received or were expected to be received, which bills were drawn upon him by the Shipping Company at Edinburgh. These acceptances, it was said, were paid by Messrs. Downe, Bell, and Mitchell, some, or the greater part, of them falling due after this agreement had been entered into: and it was said that these circumstances so united and blended together the accounts, that it became necessary to investigate the previous account, — the account of the agency of Mr. Mitchell. But it does not appear to me that the argument is well founded. Those acceptances were made by Mr. Mitchell, who was the agent of the Shipping Company, in respect of freight he had received, or which he expected to receive; and being his acceptances, he was bound to take them up. It does not, I think, appear that the Shipping Company were informed in what mode the bills were taken up, or by whom they were taken up. They knew that the bills, when they arrived at maturity, had been paid. If, in point of fact,

they were paid by money provided by Downe, Bell, and Mitchell, for the credit of Mitchell, and if they chose to provide funds for their partner Mitchell, to enable him to take up the bills, that was an affair between them and Mitchell, with which the Shipping Company had no concern. It does not appear to me, therefore, that that circumstance so blended and mixed the accounts together, as to render it necessary for the accountant to enter into the previous account.

But it was further stated, that there was a balance due to Mitchell,—a balance of somewhat more than 100*l.*,—and that that balance was paid to Mitchell by Downe, Bell, and Mitchell. But if so, that circumstance does not affect the present question. It was a sum due from the Shipping Company to Mitchell; and if the new agents, Downe, Bell, and Mitchell, thought proper to pay that balance, they paid it as the agents of the Shipping Company, and were entitled to reimbursement for that sum as against the Shipping Company, and probably they did receive that sum from the Shipping Company. It does not appear to me, therefore, that there were any circumstances in this case, so blending the accounts together, as to render it necessary for the accountant to go back beyond the period when the contract was entered into, namely, the month of October 1809. I am of opinion that the principle upon which he acted in the investigation of these accounts was perfectly correct.

But then it was said, that Mitchell being one of the defenders, according to the law of Scotland, if a sum of money was due to him, though the action was brought against him and two other

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persons (a defendant certainly, according to the law of England, would not have been entitled), yet he was entitled to set off that particular debt against a claim made against him and his partners. Now, it does not appear necessary to say any thing in respect to this doctrine as a general rule; nor is it necessary for me to advert to the authorities which have been cited for the establishment of that rule, since it is not every claim that can be set off. For, according to the authorities, the rule applies only to matters of liquidated debt, or matters admitting of immediate or ready liquidation. If it be a disputed claim; if, in order to ascertain the amount, litigation and contest became necessary; the debt or claim cannot be set off or made use of for the purpose of compensation, as it is called in the law of Scotland.

Without referring to particular authorities in support of this position, I shall advert to a summary of those authorities in Mr. Bell's work, which summary is supported by the authorities themselves. Mr. Bell says, "In compensation, the debts must both be liquid or capable of immediate liquidation. A debt is deemed liquid when it is actually due, and the amount ascertained '*cum* '*certum an et quantum debeatur.*' But if the debt itself be contested, and the creditor has not his proof ready, or if the amount be disputed, and it depends upon a long discussion what is to be adjudged due, the debtor will not be allowed to avoid payment of what is liquid and due, till that litigation be terminated." Now, no person can advert to the circumstances of this case, with respect to the state of this account, and not find himself compelled to come to this conclusion,—

that the amount due to Mr. Mitchell, supposing any thing to be due to him, must of necessity be a subject of contest, and a subject of contest of a sufficiently complicated description. In order to ascertain what was due to Mr. Mitchell, it would be necessary to go through the whole of his account, and unravel every part of it; and there is this circumstance, — that, though the account of Mr. Mitchell ceased in the year 1809, several years had elapsed before this question was agitated, and no claim had been made on the part of Mr. Mitchell of any debt or supposed debt due from the company to him. Under these circumstances, I am of opinion, whatever may be the general principle in respect of set-off or compensation in Scotland, that this case comes within the exception stated by Mr. Bell to the principle by which the courts of Scotland are governed in allowing compensation, and that the court below were right in coming to the conclusion that the set-off or compensation ought not to be allowed.

There were various other objections in point of fact made by the accountant; many claims were preferred, which he disallowed. It is not my intention to trouble your Lordships by going through all the long and complicated details with reference to this part of the case. I have read them with great care and attention, and I see no reason to dissent from the conclusion to which the accountant came on a consideration of those matters, which conclusion has been supported by the judgment of the Lord Ordinary, and by the subsequent judgment of the Court of Session.

I will state, however, one case by way of example. A claim was made to some amount for a charge

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for printing carmen's notes and receipts. It was very properly stated, that it was the business of the agent who received a commission to make out those receipts himself; and that, if he chose to get them printed for the purpose of saving trouble to himself, that expense ought to fall upon him, and not upon his employers: but that which is the decisive answer to this demand, and most of the others under the same circumstances, is, that those wharfingers were in the habit every month of sending their account. That account contained on the one side the particulars of the freights which were due, and on the opposite side all the charges to which the wharfingers considered themselves entitled, and which they claimed by way of deduction, entering into the most minute and detailed particulars. The claim to which I have referred would naturally, if intended to have been made, have formed a part of the amount so deducted. But it did not; and the same observation applies to others, none of which were inserted in these monthly accounts. There is reason therefore to conclude, from this circumstance, that all this was an after thought; and that, if this agreement had not been broken off in the manner I have stated, no such charge would in point of fact have been made.

I do not think it necessary to trouble your Lordships farther on this part of the case; but there was one item particularized at the bar as decisively calling upon the House to allow this appeal. I mean the charge in respect of interest which the accountant had found due on the sum of 850*l.*, the balance which appeared to remain due. He charged the interest upon that balance from the

last day of January, when the agreement was broken off. It turned out, that at that period there were freights outstanding to the amount of upwards of 1200*l*. The interest was, therefore, incorrectly charged. The freights were in the course of gradual collection, and the greater part of the freights comprised in that 1200*l*. were collected in the course of one, two, three, and four months. If then, we were to take an average, and suppose the whole collected in about two or three months, — the receipt of some being earlier, and that of others later, — it is obvious that the amount charged in the shape of interest would be a very minute and trifling sum, amounting only to a few pounds, and not of itself a subject of such importance as to justify remitting the case on that ground.

But it appears that these wharfingers, during the period of the transactions in question, had in their hands considerable balances belonging to the Shipping Company; and that, if they were charged for interest upon those balances, that would amount to a much larger sum than that which is complained of. Under these circumstances, no injustice has been done to these Appellants, and there is no ground to justify a variation of the judgment of the court below.

Judgment affirmed.

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SCOTLAND.

(COURT OF SESSION.)

ARCHIBALD FARQUHARSON - - - *Appellant.*FRANCES BARSTOW - - - - - *Respondent.*

An agreement between A. and B., that A. shall transfer to B. 12,000*l.* *three per cent. consols*, which at the date of the agreement were selling at 63*l.* 10*s.* per cent., and that B., in consideration of the transfer, should give security to pay to A. 10,000*l.* sterling when the *three per cent. consols* should be sold at 83*l.* 10*s.* per cent., but with liberty to retain the loan for two years and six months after such event, and in the mean time to pay interest upon 10,000*l.* at 5 per cent. is not an usurious contract.

If the terms of a contract are proposed and accepted by letters, but are afterwards varied by the contract as drawn up, the construction of the contract cannot be affected by the letters.

THE Respondent, in March 1803, being possessed of a sum of 12,000*l.* *three per cent. consols*, which were then selling at 63½ *per cent.*, a correspondence by letter took place between the Respondent and Francis Russell, who proposed that the Respondent should assign to him her right and interest in the stock, and that he should give the Respondent security to pay to her 10,000*l.* sterling, with interest at five *per cent.* when the *three per cent. consols* should reach the price of 83*l.* 10*s.* per cent. The letter of Mr. Russell contained various

other terms of the proposed agreement. The proposal was accepted by the Respondent, in a letter dated the 21st of March 1803, which recited the terms in Mr. Russell's letter. Mr. Russell drew up, executed, and delivered to the Respondent a heritable bond in the following terms, varying in some material particulars, but in substance and effect corresponding with the agreement proposed and accepted in the letters: —

“ I, Francis Russell, of Blackhall, advocate,
 “ hereby grant me to have borrowed and received,
 “ and to be at the date of these presents justly
 “ resting, owing, and indebted to Miss Frances
 “ Barstow, only daughter, &c. in and of the sum
 “ of 10,000*l.* sterling money of Great Britain,
 “ whereof I hereby acknowledge the receipt, re-
 “ nouncing all objections to the contrary: There-
 “ fore I hereby bind and oblige myself, my heirs,
 “ executors, and successors whomsoever (renounc-
 “ ing all benefit of discussing them in order), to
 “ content and repay to the said Miss Frances
 “ Barstow, or to the executors or trustees now ap-
 “ pointed or to be appointed by her for carrying
 “ into execution the disposal of her property and
 “ effects at her decease, either by her last will or
 “ settlement now actually made, or by any latter
 “ will or settlement which she may at any future
 “ period of her life think fit to make, expressly
 “ barring and secluding all other heirs and all
 “ other executors, the said sum of 10,000*l.* money
 “ aforesaid, and that at and against the terms and
 “ under the conditions after mentioned, with pe-
 “ nalty, &c. and with the due and ordinary interest
 “ or annual rent of 5*l.* per cent. per annum of the
 “ said principal sum, from and after the 20th day

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“ of June next, &c., and that at two terms in the
“ year, viz. 20th day of December and 20th day
“ of June, by equal portions, beginning the first
“ term’s payment of the said interest upon the 20th
“ day of December next for the half year imme-
“ diately preceding, and the next upon the 20th
“ of June thereafter, and so forth termly and pro-
“ portionally during the not payment of the said
“ principal sum, &c., with penalty, but always with
“ and under the following conditions and pro-
“ visions: And it is hereby expressly conditioned
“ and provided by me, that it can or shall in no
“ case be lawful for the said Miss Frances Barstow,
“ or her above written, or any other in her name
“ or right, to call upon me for repayment of the said
“ principal sum of 10,000*l.* money aforesaid, and
“ that neither I nor my aforesaid shall be bound to
“ repay the same beyond the sum of 2000*l.* thereof
“ in an event hereinafter specified, until the space
“ of two full years and six months has elapsed
“ from and after the day on which the government
“ stock or fund denominated three per cent. con-
“ solidated annuities shall have been publicly and
“ currently sold at the Stock Exchange in London,
“ to the broker employed by government for pur-
“ chasing up the national debt, or other public
“ character or agent, in sums exceeding in the
“ course of one year one million of the said stock
“ (the said term of delay to count and run how-
“ ever from the first day on which any sum to the
“ amount of 20,000*l.* of the said stock shall be so
“ purchased), at the rate and price of 83*l.* 10*s.*
“ sterling for each and every 100*l.* stock in said
“ consolidated annuities, nor until six months after
“ I shall have received a notice and requisition in

“ writing, subscribed by the said Miss Frances Bar-
 “ stow, or her agent or her above written, that said
 “ stock has been sold two days before the date of
 “ said notice at the above rate, and requiring me
 “ to pay up said principal sum in six months there-
 “ after, the amount and notoriety of the sale being
 “ as above described ; declaring nevertheless, that
 “ in the event of the said Miss Frances Barstow
 “ her marriage, I shall be and am bound, in two
 “ months after such event, to pay to her the sum
 “ of 6000*l.* sterling, to be credited to me however
 “ in the payment of the sums contained in the
 “ bond at the rate at which the 3 per cent. con-
 “ sols shall then sell, that is, allowing in my favour
 “ whatever they then sell for below 83*l.* 10*s.* per
 “ 100*l.* stock, and that at all times and for any
 “ purpose of hers I shall be constantly bound in
 “ one month to pay to her any sum not exceeding
 “ 1000*l.* sterling, upon the same terms as above
 “ expressed in the event of her marriage, and
 “ both or either of such payments being first duly
 “ discharged to me as in part payment of the
 “ money due by me in virtue of this bond and
 “ obligation ; it being however expressly condi-
 “ tioned and provided on my part, that in the
 “ event of the principal sum shall remain unpaid
 “ by me or my aforesaid at the time of the de-
 “ cease either of myself or the said Miss Frances
 “ Barstow, and that whether from the circum-
 “ stances of the said stock never having arisen to
 “ the said stipulated price of 83*l.* 10*s.* sterling per
 “ 100*l.*, or from her or her above written not
 “ having thought fit to raise and call up the same,
 “ in either case that no greater part of the said
 “ principal than 2000*l.* sterling shall be payable

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“ by me or my aforesaid in a shorter or less
 “ period than two years, but that such sum of
 “ 2000*l.*, or any sum or sums not exceeding that
 “ amount appointed by her in any will or other
 “ settlement of hers, shall be payable to the ex-
 “ cutors or trustees named by her as aforesaid,
 “ 1000*l.* thereof in six months from her decease,
 “ and the remainder thereof within the said space
 “ of two years next thereafter, and that the re-
 “ maining 8000*l.* shall be only payable by two
 “ equal portions or instalments, the one or first in
 “ four years after such decease, and the other not
 “ until six years after such decease; and it being fur-
 “ ther expressly provided and declared, that in the
 “ event of such principal money due at the period
 “ of the decease of the said Miss Frances Barstow,
 “ from its never having been hitherto exigible
 “ from me or my foresaid in respect of the said
 “ 3 per cent. stock having at no time since the
 “ date thereof attained the said price of 83*l.* 10*s.*
 “ per centum, then and in that event, not only as that
 “ above provided, I shall not be bound and obliged
 “ to repay said principal sum until such price can
 “ be obtained, but also that after the decease of
 “ the said Frances Barstow I shall only be liable
 “ in and bound to pay interest therefor at the rate
 “ of three and a half per centum per annum; and it
 “ being hereby conditioned and declared that the
 “ said principal sum shall remain unpaid in my
 “ hands, secured as hereby secured, until it arises
 “ that the said three per cent. stock shall reach and
 “ attain the said stipulated price and value of
 “ 83*l.* 10*s.* sterling per hundred thereof, and for
 “ two years and six months after such event shall
 “ so have taken place, the said interest however to

“ be payable in the portions and at the half yearly
 “ terms above herein conditioned for payment of
 “ the higher interest; and lastly, it is hereby ex-
 “ pressly provided and conditioned by me, and
 “ declared to be the full meaning of the said
 “ Frances Barstow, and the condition under which
 “ this bond and obligation is granted by me to her,
 “ that I and my foresaids can on no ground or
 “ pretence whatever be obliged or compelled either
 “ by herself or her above written, or by any having
 “ right from them, to pay up the said sum of
 “ 10,000*l.* sterling, sooner, or until two years and
 “ six months after the said 3 per cent. stock shall
 “ have attained the said price of 83*l.* 10*s.* sterling
 “ by the 100*l.* of such stock, otherwise than in the
 “ event and to the extent above specified, I being
 “ however expressly bound and obliged during all
 “ the days of the said Frances Barstow’s life, to pay
 “ her in all events the interest of the said principal
 “ sum of 10,000*l.* sterling money aforesaid, and
 “ that always at the rate of 5 per centum per an-
 “ num, at the terms and in the half yearly pro-
 “ portions above specified, and in respect of the
 “ mutual conditions, considerations, and provisions
 “ hereby made, to keep and hold the said principal
 “ sum at that rate of interest during all the days
 “ of her life if she shall so incline and require, and
 “ that without regard to what the ordinary rate of
 “ interest may fall, and for the said Miss Frances
 “ Barstow and her above written, their further
 “ security and more sure payment of the sums of
 “ money, principal, interest, and penalties above
 “ specified, and without prejudice to the above
 “ personal obligation, but in farther corroboration
 “ thereof, under nevertheless the above written

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“restrictions and provisions in my favour, I, the
 “said Francis Russell, bind and oblige myself and
 “my foresaids, &c.” The bond contained the
 usual obligation to infest, with precept of sasine
 and other clauses.

The interest reserved upon this bond was paid
 by Mr. Russell during his life. In 1806 the Re-
 spondent was infest, and the payment of interest
 was continued by the widow and representative of
 Mr. Russell. In 1818, the Appellant having mar-
 ried one of the daughters of Mr. Russell, the lands
 burdened with the bond were conveyed to the
 Appellant. The consols did not rise to 83½ per
 cent. until the year 1817. In 1824 they were at
 96 per cent.

In March 1824, the Appellant brought an action
 to reduce the heritable bond as founded in usury,
 and void under the Bubble Act, 7 G. 2. c. 8. s. 1.

The conclusion of the summons was, “that the
 “bond and sasine should be reduced, and the
 “whole sums of money received in name of in-
 “terest should be paid back to the pursuer, or
 “that the principal sum in the bond should be
 “restricted to 7,620*l.* with legal interest thereon,
 “and against it should be placed all sums received
 “as interest from Mr. Russell, Mrs. Russell, and
 “the pursuer.”

For the Appellant the following authorities
 were cited;—Comyn on Usury, 156. *et seq.*;
 Colvil, Dic. of Dec. (6825.)

For the Respondent, 3 Wilson’s Reports, 390.;
 Comyn on Usury, 22.; *Bedingfield v. Ashley*, Cro.
 Eliz. 741.; *Moore v. Battie*, Amb. 371. *cont.*;
Pike v. Ledwell, 5 Esp. 164.; Robertson’s Ap-
 Cases, 471.

*The Lord Chancellor.**—It is argued that the period for the payment of interest is not for life, but indefinite. If it were so, the whole payments of interests would be less than legal interest, since one period is definite and the other indefinite. The parties apparently contradict themselves two or three times. But I think that you will find that while 1000*l.* may be called up whether the stock rise to 83½ or not, the rest, if the rise did not take place, would lie at 3½ per cent. By this transaction Mr. Russell is not obliged to pay the 10,000*l.* until the stock he has purchased is worth that sum. In the mean time he is to pay more than 5 per cent. on the selling value of the stock, that is, more than legal interest. But, on the other hand, he has this advantage, that he is not obliged to pay the price whenever the stock is actually worth the 10,000*l.*, but he is entitled to take two years and a half longer, and during that time to speculate on the stock being higher, and he is to have the whole benefit of the speculation. It would appear then that the benefit of the chance is an equivalent for the excess of the interest.

† The difficulty of this case arises from the conditions of the bond being so complicated. But before we can reach a sound judgment, we must be sure that we thoroughly comprehend every part of its bearing. I was looking to the letters for the contract, but I perceive that the contract itself materially differs from them, and we must take the bond as the contract between the parties. If

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* During the progress of the argument.

† At the conclusion of the argument.

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this be a perpetual annuity, this lady would receive less than five per cent. on the value of the stock, and in one event it is a perpetual annuity.

We think, under these circumstances, that this cannot be considered an usurious transaction, and that consequently the judgment must be affirmed.

Judgment affirmed with 50*l.* costs.

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SCOTLAND.

(COURT OF SESSION.)

GORDON and Others - - - - - *Appellants;*MARY BROWN - - - - - *Respondent.*

A., who was domiciled in America, gave to B., one of his sisters, one fourth of the residue of his property for her life, subject "at her death to be equally divided among her children, "should she have any." Upon a suit in the proper court in America, B. having no children, it was decreed that the fund should be paid to her. This decree was made upon a bill taken *pro confesso* against parties who were out of the jurisdiction, there being two executors within the jurisdiction upon whom the decree operated. One of these absent Defendants having received the funds of B. under a power from her, upon a suit against him for an account, and an objection raised, that B. was entitled to no more than a life interest under the will, it was held, that such a question could only be raised by proceeding in the court in America to rehear the cause.

An agreement liable to be impeached for fraud, cannot be made void in a suit for an account, without a suit to have it declared void.

WILLIAM BROWN, who was by birth a Scotchman, residing at Lynchburgh, in Virginia, and being domiciled in that country, made his will in 1805, and died in the year 1811. By that will he bequeathed as follows:— "The remainder of "my estate, after deducting therefrom the above "legacies, is to be divided in the following man-

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“ner, viz. to my father and mother, James and
 “Margaret Brown, of Kirkcudbright, North Bri-
 “tain, I leave one fourth share of the balance of
 “my estate to them, or the survivor of them; to
 “my sister Jean Muir, Kirkcormick, in Galloway,
 “Scotland, I leave one fourth share of the balance
 “of my estate, at her death to be equally divided
 “between her children; to my sister Isabella
 “Black, of Castle Douglas, Scotland, I leave one
 “fourth of the remainder of my estate, to be at
 “her death equally divided between her children;
 “to my sister Mary Brown, Kirkcudbright, North
 “Britain, I leave the remainder one fourth share
 “of the balance of my estate, at her death to be
 “equally divided between her children, should
 “she have any.”

A small legacy was also left to John Brown, a natural son of a deceased brother.

The will was proved in America by the executors, among whom was A. J. Robertson, and James the father, and the mother also administered to funds in England.

In the year 1815 James Brown and Margaret his wife conveyed to John Brown all their interest in the one fourth share of the property bequeathed by the will of William Brown, together with any other interest to which they might be entitled under that will, or in right of representation or otherwise.

James Brown died in 1815.

In 1816 a case was laid before Sir Arthur Pigott, upon which he gave an opinion that Mary Brown took only a life interest in the fund given to her by the will, and as she had no children, the fund, subject to her life interest, was not disposed of,

but vested in the testator's father, James Brown, subject to be divested by the birth of a child of Mary Brown.

In 1817 Margaret Brown executed a deed of confirmation of the former deed of disposition of this property, made by her conjointly with her husband James Brown.

In 1816 Mary Brown gave to the administratrix in England, a discharge or release in respect of a sum of 1652*l.* 13*s.* 6*d.*, her share of the funds in England. This discharge was given by her as life-renter of the fund, and John Brown joined in it as owner of the reversion.

In 1817 a suit was instituted in the Federal Chancery Court of the Virginia district in America, by the Respondent and Jean Muir, as one of the residuary legatees under the will of William Brown, against Margaret, as administratrix with the will annexed, and John Brown the nephew.

In the month of May 1816 a decree *pro confesso* was pronounced against Defendants who were out of the jurisdiction.

The material part of the decree was in these terms: "It is decreed that in consideration of the
 "premises, the Court is of opinion that Jean Muir,
 "Mary Brown, and Isabella Black by the will of
 "the said William Brown are entitled each to one
 "fourth of the estate remaining of the said William Brown, after payment of the just debts and
 "the legacies, amounting to 10,000 dollars, bequeathed to others, but that the payment of the
 "share of the said Jean Muir and Isabella Black
 "(both of them having children) ought not to be
 "made unless security be given that at their re-

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“ spective deaths, their shares should be divided
“ amongst their children as provided by the will
“ of the testator, and doth accordingly adjudge,
“ order, and decree that the Defendants, Archi-
“ bald Robertson and William Black, surviving
“ executors of the said William Brown, do pay to
“ the said Mary Brown one fourth of the residuary
“ estate of the testator ; and to the said Robert
“ Muir and William Black, in right of their re-
“ spective wives, each one fourth of the said re-
“ siduum upon their severally executing, in person
“ or by their attorney, a bond to be deposited with
“ the clerk of the Court, payable to the surviving
“ executors in the penalty each of 70,000 dollars,
“ with condition, that on the death of their said
“ wives, their legacies shall be divided amongst
“ their children.” The effect of this decree, as
far as it related to the Respondent, was, that she
should have her one fourth share of the residue
paid to her absolutely.

In the month of October 1816, a power of at-
torney was executed by the Respondent, autho-
rizing John Brown and Robertson, one of the
executors, to receive on her account the money
that she should be entitled to under the will of
the testator, and in pursuance of that power of
attorney, and in conformity with the decree, the
money was afterwards paid over to John Brown as
the attorney for Mary Brown.

In 1817, the Respondent agreed to assign to
John Brown her interest in the 1652*l.*, in con-
sideration of an annuity of 50*l.* a year.

In 1820, the Respondent sued John Brown in
the Court of Session for an account of monies re-

ceived by him in respect of the Respondent's share of the estate of William Brown, and to rescind the annuity transaction.*

In 1823 John Brown died, and the suit was revived against the Appellants his trustees. The proceedings were very complicated, the appeal being from no less than fifteen interlocutors. The substance and result in judgment was, that the Appellants were bound to account; but that the agreement as to the annuity could not be avoided without a process for reduction. The appeal was against this judgment.

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The Lord Chancellor. — It is difficult, under the circumstances in this case, to say that Mary Brown is not entitled to an account against John Brown, for money received in pursuance of a decree of a competent court in America pronounced upon the subject of this will in a suit instituted for that purpose, directed to be paid over and received by John Brown under a power of attorney given to him for that purpose by Mary Brown. It is said, however, that Mary Brown is entitled only to a life interest in this property; and that she being entitled only to a life interest in this property, that the residue was not disposed of, and that it would pass therefore to James Brown the father, and through that father, by virtue of the settlement made by him and Margaret Brown, and her subsequent confirmation, that it would pass to John Brown. For the purpose of establishing that such was the true construction of the will, the opinion of an English lawyer upon the subject was offered

* See the facts as to this transaction stated by the Lord Chancellor, p. 575.

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in evidence, an English lawyer, undoubtedly, of eminence; but the Court of Scotland justly observed, that they had nothing to do with the law of England, and that there was no evidence in the cause to shew that the law of Virginia corresponded with the law of England upon the matter in question; viz. with respect to the rules by which an instrument of that kind was to be construed, and, therefore, they paid no attention to the opinion.

It was farther urged, (and a petition was presented for the purpose,) that the opinions of American lawyers of that particular district of America should be taken, with a view to guide the consideration of the case. The Court, however, rejected that petition, and I think they were right in doing so, under the circumstances of this case.

The question with respect to the construction of the will had been before the Court in America. In the year 1816 they had pronounced, in effect, a judgment as to the construction of that will, for they had decreed that Mary Brown was entitled absolutely to this property; they had directed that property to be paid to her, and it was paid accordingly to the agent appointed by her to receive that which she was entitled to under the will. It seemed, therefore, under these circumstances, and after so long an interval of time, not right again to postpone the cause for the purpose of taking further evidence as to the real and proper construction of the will.

It was urged, however, that John Brown ought not to be bound by that decision, because, although he was a party to the suit and his name was upon the record, yet the decree was made in his ab-

sence, he being in England at the time when the decree was pronounced. But although your Lordships cannot judicially be apprised of what the law of America is in this respect, yet it is not unreasonable to suppose, that if the decree was made in the absence of John Brown, he might have gone to America and obtained a rehearing of that decree. It is not suggested in these papers that John Brown was not apprised of that decree at the time when it was pronounced in the year 1816. He had received from the executor the money under that decree; he had taken no steps from the year 1816, for a period of ten years, to call that decree in question; and, therefore, I think the Court below rightly judged that they might take that decree as the foundation of their judgment, and decide accordingly.

There is another point also insisted upon, to which I shall beg leave also shortly to advert. It was stated that Mary Brown had herself admitted that she was in fact only entitled to a life interest of this property. The facts of the case as far as they relate to this point are very shortly these. A part of the property of William Brown was in England. Administration with the will annexed was taken out by Margaret Brown, the mother, in regard to that property, and the surplus of that property, after discharging liabilities, amounted to 1650*l.*, and that 1650*l.* was paid over to Mary Brown, or rather was paid into the hands of John Brown. At the time when that transaction took place, a deed was executed between John Brown and Mary Brown, in the recital of which it was undoubtedly stated that Mary Brown was entitled only to a life interest, and she conveyed the whole of her in-

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terest in this property to John Brown for an annuity during her life of only 50*l.*, with this clause and condition, that that annuity should be payable to her only during the time that she resided with him. It is a part of the case on behalf of the Respondent, that she was a woman of weak understanding, liable to be controlled, and governed, and imposed upon by persons round her. It was proved that she went away with a man of inferior condition in life, that she was imposed upon and induced to enter into a marriage which was afterwards considered null by the Court in Scotland. There was also proof of other facts to which I will not particularly advert, but it is quite evident that she was a woman of weak understanding, and the Court below judged the annuity transaction to be a fraud practised upon her by John Brown, and not growing out of the deed itself. The 1650*l.* were by the terms of that deed to be absolutely assigned to John Brown in consideration of the equivalent of only 50*l.* a year, that payment of 50*l.* to be suspended in the event of her not residing with John Brown; I think, therefore, the Court judged rightly in considering this transaction as fraudulent, and that the recital in the deed ought not in any degree to operate to the prejudice of Mary Brown.

I presume, that under these circumstances your Lordships will be disposed as to this part of the case, to be of opinion that the Court of Session came to a right conclusion in considering that John Brown, and afterwards his trustees upon his death, were liable to account for the money which had been so received from the executors of William Brown, under the will to which I have adverted.

There were other subordinate points in the cause, consisting of matter of detail in the progress of it, particularly with respect to the mode of taxing the account as to the allowances to be made on the one side and the other, as to the costs, as to the charges and other matters of that description, which were argued at great length. At the time when the argument was going on I had little doubt as to the propriety of the decision of the Court of Session as to those matters: I have since looked through the whole, and I see no reason to depart from the opinion I entertained at that time. I shall, therefore, under these circumstances, humbly recommend to your Lordships that the judgment of the Court of Session, consisting of these various interlocutors pronounced by the Lord Ordinary, and the interlocutors pronounced by the first decision of the Court of Session should be affirmed, and under the circumstances of this case, with your Lordships' permission, I would recommend that they should be affirmed with certain costs.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be affirmed, with 50*l.* costs.

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THE SEA
INSURANCE
COMPANY OF
SCOTLAND
v.
GAVIN.

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(COURT OF SESSION.)

THE SEA INSURANCE COMPANY OF } *Appellants;*
SCOTLAND - - - - - }

GAVIN and Others - - - - - *Respondents.*

Under a policy insuring a brigantine "at and from L. to S.,
"and thence to Barcelona, and at and from thence and two
"other ports in Spain, to a port in Great Britain:" — held,
that Saloe, a place lying in a bay, having warehouses and a
jetty, with a depth of water sufficient for feluccas, but not for
large ships, and a good roadsted anchorage where ships lie
and are loaded by means of small craft; having also a custom-
house and officers, is a "port" within the meaning of the
policy.

THE Appellants underwrote a policy of insurance
upon the ship Sarah, a brigantine, which belonged
to the Respondents. The risk insured was, "at
"and from Leith to Shetland, and from thence to
"Barcelona, and at and from thence, and two other
"ports in Spain, to a port in Great Britain."

The Sarah took in a cargo of fish at Shetland,
and sailed for Barcelona; but as an infectious dis-
ease was raging there, she proceeded to Tarrag-
ona, where she discharged her cargo.

In order to take in the home cargo, the Sarah
sailed to Saloe, which lies in the recess of an open
bay, about ten miles from Tarragona. The Sarah,
while she was loading in this bay, was driven on
shore by a storm, and wrecked.

The Respondents claimed for a total loss against the Appellants. But the claim was resisted upon the ground that Saloe was not a port, but an open roadsted, and that the risk in such a place was not within the contract of insurance.

The case was brought before the Judge Admiral, and it was proved that Saloe lies in a bay, which is fifteen miles in length; that it is protected from the winds on the north, and by Cape Saloe and the land on the north of the bay, but exposed to winds from the east, round by south to west: that there are warehouses and a jetty, with a depth of water sufficient for feluccas, but not for large ships: that a heavysurf sometimes breaks on the shore, but there is a good roadsted anchorage, where ships trading to Saloe usually lie; and that there is a port captain.

It was also proved that the British Consul, residing at Rons, an inland town of which Saloe is considered as the port, usually describes himself as Vice-Consul for the *port* of Saloe, and its district: that, according to the practice of the Spanish Government in all the accessible bays of Spain, there was a custom-house and officers: that vessels trading to Saloe generally take on board their cargo by the means of small craft.

It was farther proved that the station of the Sarah in this bay or roadsted was fixed by the port captain and custom-house officer: that she rode in the usual anchorage, and could not without permission have changed her station.

It was on the other hand proved that, at Barcelona and Tarragona, there are moles and works for the protection of large vessels, with accommodation for loading and unloading in deep water. But it appeared that these works, during south-westerly gales, did not afford a sufficient protection,

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and that in such weather the roadstead at Saloe was preferable, because it possessed a greater range. Upon the question whether Saloe was to be considered as a "port" within the meaning of insurance brokers were not agreed in opinion. But it was in evidence, that a higher premium was required upon policies of insurances to "*ports and places*" than where the risk was limited to the word "ports." Seamen also being examined upon this question differed in opinion whether Saloe was to be considered as a "port" or merely an anchorage. In this state of the cause and question, Mr. Tindal (now Lord Chief Justice of the Common Pleas), being consulted by direction of the Judge Admiral, gave it as his opinion that upon the evidence in the cause an English jury would find that Saloe was a port within the meaning of the policy, and thereupon the Judge Admiral found it proved that Saloe, "where the Sarah was wrecked, was a '*port*' within the meaning of the policy, and that the vessel was within the same (port) at the time when the loss took place." The appellants then brought the case by suspension before the Court of Session, and on the 3d of March, 1827, judgment was given against them.

The appeal was against this judgment.

The following authorities were cited: *Constable v. Noble*, 2 Taunton, 403. 1 Marshall on Insurance, 248. 276. *Cockey v. Atkinson*, 2 Barnewall and Alderson, 460. *Brown v. Tierney*, 1 Taunton, 517. *Keysor v. Scott*, 4 Taunton, 660. *Baring v. Vaux*, 2 Campbell, 541. *Molloy de jure maritimo*. 2 Postlethwaite's Dict. 505. *Voce* "Port." Galt's Mediterranean, 102. Comyn's Digest, Merchant, E. 9.

Judgment affirmed.

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REGULÆ GENERALES.

Trinity Term, 1 W. 4.

IT IS ORDERED, that a Defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday. That if the Plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof as aforesaid to the Defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days in the case of town bail, and six days in the case of country bail, then (unless the Court or a Judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the mean time.

AND IT IS FURTHER ORDERED, that every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number, (if any,) where each of the bail resides, and all the streets or places, and numbers, (if any,) in which each of them has been resident at any time within the last six months, and whether he is a house-keeper or freeholder.

AND IT IS FURTHER ORDERED, that if the notice of bail shall be accompanied by an affidavit of each of the bail, according to the form hereto subjoined, and if the Plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification, and if such bail are rejected, the Defendants shall pay the costs of opposition, unless the Court or a Judge thereof shall otherwise order.

AND IT IS FURTHER ORDERED, that if the Plaintiff shall not give one day's notice of exception to the bail, by whom

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such affidavit shall have been made, the recognizance of such bail may be taken out of court without other justification than such affidavit.

AND IT IS FURTHER ORDERED, that the bail, of whom notice shall be given, shall not be changed without leave of the Court or a Judge.

AND IT IS FURTHER ORDERED, that with every declaration, if delivered, or with the notice of declaration, if filed, containing counts in *indebitatus assumpsit*, or debt on simple contract, the Plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios. And to secure the delivery of particulars in all such cases, it is further ordered, that if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a Judge shall afterwards order a delivery of particulars, the Plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. And that a copy of the particulars of the demand, and also particulars, (if any,) of the Defendant's set off, shall be annexed by the Plaintiff's attorney to every record at the time it is entered with the Judge's marshal.

AND IT IS FURTHER ORDERED, that upon every declaration, delivered or filed, on or before the last day of any term, the Defendant, whether in or out of any prison, shall be compellable to plead as of such term without being entitled to any imparlance.

AND IT IS FURTHER ORDERED, that no judgment of *non pros* shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made, in writing, upon the Plaintiff, his attorney or agent, as the case may be.

AND IT IS FURTHER ORDERED, that hereafter it shall not be necessary to issue more than two summonses for attendance before a Judge upon the same matter; and the party

taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shown to the contrary.

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AND IT IS FURTHER ORDERED, that no declaration *de bene esse* shall be delivered until the expiration of six days from the service of the process in the case of process which is not bailable, or until the expiration of six days from the time of the arrest in case of bailable process; and such six days shall be reckoned inclusive of the day of such service or arrest.

AND IT IS FURTHER ORDERED, that declarations in ejectment may be served before the first day of any term, and thereupon the Plaintiff shall be entitled to judgment against the casual ejector in like manner as upon declarations served before the essoign or first general return-day.

AND IT IS FURTHER ORDERED, that before taxation of costs, one day's notice shall be given to the opposite party.

AND IT IS FURTHER ORDERED, that no rule to show cause, or motion, shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but that such rules shall be drawn up upon a Judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries, or cognizances. Provided, that no summons or order shall be necessary in the following cases; that is to say, where the plea of *non assumpsit*, or *nil debet*, or *non detinet*, with or without a plea of tender as to part, a plea of the statute of limitations, set off, bankruptcy of the Defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, *infancy*, and *coverture*, or any two or more of such pleas shall be pleaded together; but in all such cases a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof.

AND BE IT FURTHER ORDERED, that these rules shall take effect on the first day of next Michaelmas term, except the rule as to the service of declarations in ejectment, which shall take effect from the 25th day of October next.

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*Form of Affidavit.*

IN THE

BETWEEN, &c.

A. B., one of the bail for the above-named Defendant, maketh oath and saith, that he is a housekeeper, [*or, freeholder, as the case may be*] residing at [*describing particularly the street or place, and number, if any*], that he is possessed of property to the amount of £ [the amount required by the practice of the Courts] over and above all his just debts; [*if bail in any other action, add "and every other sum for which he is now bail;"*] that he is not bail for any Defendant except in this action, [*or, if bail in any other action or actions, add "except for C. D. at the suit of E. F. in the Court of in the sum of £ ;" of G. H. at the suit of I. K. in the Court of in the sum of £ ;" specifying the several actions, with the Courts in which they are brought, and the sums in which the deponent is bail ;*] that the deponent's property, to the amount of the said sum of £ [and if bail in any other actions "of all other sums for which he is now bail as aforesaid,"] consists of [*here specify the nature and value of the property, in respect of which the bail proposes to justify, as follows : —* Stock in trade, in his business of carried on by him at of the value of £ of good book debts owing to him to the amount of £ of furniture in his house at of the value of £ of a freehold or leasehold farm, of the value of £ situate at occupied by or of a dwelling house of the value of £ situate at occupied by or of other property, particularising each description of property, with the value thereof;] and that the deponent hath for the last six months resided at

[describing the place or places of such residence.]

Sworn, &c.

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REGULA GENERALIS.

Trinity Term, 1st William 4. 1831.

WHEREAS declarations in actions upon bills of exchange, promissory notes, and the counts usually called the common counts, occasion unnecessary expense to parties by reason of their length, and the same may be drawn in a more concise form; now, for the prevention of such expense, it is ordered, that if any declarations in assumpsit hereafter filed or delivered, and to which the Plaintiff shall not be entitled to a plea as of this term, being for any of the demands mentioned in the schedule of forms and directions, annexed to this order, or demands of a like nature shall exceed in length such of the said forms set forth or directed in the said schedule, as may be applicable to the case; or, if any declaration in debt to be so filed or delivered for similar causes of action, and for which the action of assumpsit could lie shall exceed such length, no costs of the excess shall be allowed to the Plaintiff if he succeeds in the cause; and such costs of the excess as have been incurred by the Defendant, shall be taxed and allowed to the Defendant, and be deducted from the costs allowed to the Plaintiff. And it is further ordered, that on the taxation of costs, as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and in case any costs shall be payable by the Plaintiff to the Defendant on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill.

TENTERDEN.	J. VAUGHAN.
N. C. TINDAL.	J. PARKE.
LYNDHURST.	W. BOLLAND.
J. BAYLEY.	J. B. BOSANQUET.
J. A. PARK.	W. E. TAUNTON.
J. LITTLEDALE.	E. H. ALDERSON.
S. GASELEE.	J. PATTESON.

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SCHEDULE OF FORMS AND DIRECTIONS.

Count on a Promissory Note against the Maker, by Payee or Indorsee as the Case may be.

For that whereas the Defendant on the day of
in the year of our Lord at London
[or in the county of] made his promissory
note in writing and delivered the same to the Plaintiff and
thereby promised to pay to the Plaintiff £

{ days
 weeks
 months } after the date thereof [or as the fact may be]
which period has now elapsed [or if the note be payable
to A. B.] and then and there delivered the same to A. B.
and thereby promised to pay to the said A. B. or order

£ { days
 weeks
 months } after the date thereof [or as the
fact may be], which period has now elapsed, and the said
A. B. then and there indorsed the same to the Plaintiff,
whereof the Defendant then and there had notice, and
then and there in consideration of the premises promised to
pay the amount of the said note to the Plaintiff according
to the tenor and effect thereof.

Count on a Promissory Note against Payee by an Indorsee.

Whereas one C. D. on the day of in the
year of our Lord at London [or in the county of
] made his promissory note in writing and
thereby promised to pay the Defendant or order £

{ days
 weeks
 months } after the date thereof, [or as the fact may be],

which period has now elapsed, and the Defendant then and
there indorsed the same to the Plaintiff [or and the De-
fendant then and there indorsed the same to X. Y., and the
said X. Y. then and there indorsed the same to the Plaintiff]
and the said C. D. did not pay the amount thereof, although
the same was there presented to him on the day when it
became due, of all which the Defendant then and there had
due notice.

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Count on a Promissory Note against Indorser by Indorsee.

Whereas one C. D. on at London [*or in the county of*] made his promissory note in writing and thereby promised to pay to X. Y. or order £

{ days
 weeks
 months } after the date thereof [*or as the fact may be*], which period has now elapsed and then and there delivered the said note to the said X. Y., and the said X. Y. then and there indorsed the same to the Defendant, and the Defendant then and there indorsed the same to the Plaintiff [*or and the Defendant then and there indorsed the same to Q. R. and the said Q. R. then and there indorsed the same to the Plaintiff*] and the said C. D. did not pay the amount thereof, although the same was there presented to him on the day when it became due, of all which the Defendant then and there had due notice.

Count on an Inland Bill of Exchange against the Acceptor by the Drawer, being also Payee.

Whereas the Plaintiff on at London [*or the county of*] made his bill of exchange in writing and directed the same to the Defendant, and thereby required the Defendant to pay to the Plaintiff £

{ days
 weeks
 months } after the { date
 sight } thereof, which period has now elapsed, and the Defendant then and there accepted the said bill, and promised the Plaintiff to pay the same according to the tenor and effect thereof and of his said acceptance thereof, but did not pay the same when due.

Count on an Inland Bill of Exchange against the Acceptor by the Drawer, not being the Payee.

Whereas the Plaintiff on at London [*or in the county of*] made his bill of exchange in writing and directed the same to the Defendant and thereby required the Defendant to pay to O. P. or order £

{ days
 weeks
 months } after the { date
 sight } thereof, which period has now elapsed, and then and there delivered the same to the

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said O. P., and the said Defendant then and there accepted the same, and promised the Plaintiff to pay the same according to the tenor and effect thereof and of his acceptance thereof, yet he did not pay the amount thereof, although the said bill was there presented to him on the day when it became due, and thereupon the same was then and there returned to the Plaintiff, of all which the Defendant then and there had due notice.

Count on an Inland Bill of Exchange against the Acceptor by Indorsee.

Whereas one E. F. on at London [*or in the county of*] made his bill of exchange in writing and directed the same to the Defendant and thereby required the Defendant to pay to the said E. F. [*or to G. H.*] or order £ { days
 weeks
 months } after the { sight
 date } thereof,

which period has now elapsed, and the Defendant then and there accepted the said bill, and the said E. F. [*or the said G. H.*], then and there indorsed the same to the Plaintiff [*or, and the said E. F. or, the said H. G. then and there indorsed the same to K. J. and the said K. J., then and there indorsed the same to the Plaintiff*] of all which the Defendant then and there had due notice, and then and there promised the Plaintiff to pay the amount thereof, according to the tenor and effect thereof and of his acceptance thereof.

Count on an Inland Bill of Exchange against the Acceptor by the Payee.

Whereas one E. F. on at London [*or in the county of*] made his bill of exchange in writing and directed the same to the Defendant, and thereby required the Defendant to pay to the Plaintiff £ { days
 weeks
 months } after the { sight
 date } thereof, which period has now elapsed, and the Defendant then and there accepted the same and promised the Plaintiff to pay the same according to the tenor and effect thereof and of his acceptance thereof.

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*Count on an Inland Bill of Exchange against the Drawer
by Payee, on Non-acceptance.*

Whereas the Defendant on at London [*or in the county of*] made his bill of exchange in writing and directed the same to J. K. and thereby required the said J. K. to pay to the Plaintiff £

{ days
weeks
months } after the { sight
date } thereof, and then and there delivered the same to the said Plaintiff, and the same was then and there presented to the said J. K. for acceptance, and the said J. K. then and there refused to accept the same, of all which the Defendant then and there had due notice.

*Count on an Inland Bill of Exchange against Drawer by
Indorsee on Non-acceptance.*

Whereas the Defendant on at London [*or in the county of*] made his bill of exchange in writing and directed the same to J. K. and thereby required the said J. K. to pay to the order of the said Defendant

£ { days
weeks
months } after the { sight
date } thereof, and the said Defendant then and there indorsed the same to the Plaintiff [*or and the said Defendant then and there indorsed the same to L. M. and the said L. M. then and there indorsed the same to the Plaintiff;*] and the same was then and there presented to the said J. K. for acceptance, and the said J. K. then and there refused to accept the same, of all which the Defendant then and there had due notice.

*Count on an Inland Bill of Exchange against Indorser by
Indorsee on Non-acceptance.*

And whereas one N. O. on at London [*or in the county of*] made his bill of exchange in writing and directed the same to P. Q. and thereby required the said P. Q. to pay to his order £

{ days
weeks
months } after the { sight
date } thereof, and the said N. O. then and there indorsed the said bill to the Defendant [*or*

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to R. S. and the said R. S. then and there indorsed the same to the Defendant] and Defendant then and there indorsed the same to the Plaintiff, and the same was then and there presented to the said P. Q. for acceptance, and the said P. Q. then and there refused to accept the same, of all which the Defendant then and there had due notice.

Count on an Inland Bill of Exchange against Payee by Indorsee on Non-acceptance.

Whereas one N. O. on _____ at London [*or in the county of* _____] made his bill of exchange in writing and directed the same to P. Q. and thereby required the said P. Q. to pay to the Defendant or order £ {

days
weeks
months

 } after the {

sight
date

 } thereof, and then and there delivered the same to the Defendant and the Defendant then and there indorsed the said bill to the Plaintiff [*or to R. S. and the said R. S. then and there indorsed the same to the Plaintiff]* and the same was then and there presented to the said P. Q. for acceptance and the said P. Q. then and there refused to accept the same, of all which the Defendant then and there had due notice.

Direction for Declaration on Bills where Action brought after time of Payment expired — 1st. — On Bills payable after Date.

If the declaration be against any party to the bill except the drawee or acceptor, and the bill be payable at any time after date, and the action not brought till the time is expired, it will be necessary to insert, as in declarations on promissory notes, immediately after the words denoting the time appointed for payment, the following words: viz *which period has now elapsed*, and instead of averring that the bill was presented to the drawee for acceptance and that he refused to accept the same, to allege that the drawee [naming him] *did not pay the said bill, although the same was there presented to him on the day when it become due.*

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Second.—On Bills payable after Sight.

And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time after sight, it will be necessary to insert after the words denoting the time appointed for payment the following words: viz. *and the said drawee [naming him] then and there saw and accepted the same, and the said period has now elapsed,* and instead of alleging that the bill was presented for acceptance and refused, to allege that the drawee [naming him] *did not pay the said bill, although the same was presented to him on the day when it became due.*

Direction for Declaration on Bills or Notes payable at Sight.

If a *note* or *bill* be payable *at sight* the form of the declaration must be varied so as to suit the case, which may be easily done.

On Foreign Bills.

Declarations on foreign bills may be drawn according to the principle of these forms, with the necessary variations.

COMMON COUNTS.

Whereas the Defendant on at London [*or in the county of*] was indebted to the Plaintiff in £ for the price and value of goods then and there { ^{bargained} sold } and { ^{sold} delivered } by the Plaintiff to the Defendant at his request:

And in £ for the price and value of work then and there done and materials for the same, provided by the Plaintiff for the Defendant at his request:

And in £ for money then and there lent by the Plaintiff to the Defendant at his request:

And in £ for money then and there paid by the Plaintiff for the use of the Defendant at his request:

And in £ for money then and there received by the Defendant for the use of the Plaintiff:

And in £ for money found to be due from the Defendant to the Plaintiff on an account then and there stated between them.

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*General Conclusion.*

And whereas the Defendant afterwards on, &c. in consideration of the premises, respectively then and there promised to pay the said several monies respectively to the Plaintiff on request, YET he hath disregarded his promises and hath not paid any of the said monies or any part thereof to the Plaintiff's damage of £ and thereupon he brings suit, &c.

Direction as to the General Conclusion.

If the declaration contains one or more counts against the maker of a note or acceptor of a bill of exchange, it will be proper to place them first in the declaration, and then in the general conclusion to say, promised to pay the ~~said last-mentioned several monies respectively.~~



REGULÆ GENERALES.

Hilary Term, 2 W. 4.

I.

WHEREAS it is expedient that the practice of the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, should, as far as possible, be rendered uniform: IT IS ORDERED, That the practice to be observed in the said Courts, with respect to the matters hereinafter mentioned, shall be as follows; that is to say,—

AUTHORITY TO PROSECUTE OR DEFEND.

1. Warrants of attorney to prosecute or defend, shall not be entered on distinct rolls, but on the top of the issue roll.

2. A special admission of *prochein amy* or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.

AFFIDAVIT.

3. No affidavit of the service of process shall be deemed sufficient if made before the Plaintiff's own attorney, or his clerk.

4. An affidavit sworn before a Judge of any of the Courts of King's Bench, Common Pleas, or Exchequer, shall be received in the Court to which such Judge belongs, though not entitled of that Court; but not in any other Court, unless entitled of the Court in which it is to be used.

5. The addition of every person making an affidavit shall be inserted therein.

6. Where an agent in town, or an attorney in the country is the attorney on the record, an affidavit sworn

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before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself: but this rule shall not extend to affidavits to hold to bail.

ARREST.

7. After *non pros*, nonsuit or discontinuance, the Defendant shall not be arrested a second time without the order of a Judge.

8. Affidavits to hold to bail for money paid to the use of the Defendant, or for work and labour done, shall not be deemed sufficient unless they state the money to have been paid, or the work and labour to have been done, at the request of the Defendant.

9. No supplemental affidavit shall be allowed to supply any deficiency in the affidavit to hold to bail.

10. A variance between the *ac etiam* and the declaration, or the want of an *ac etiam*, where the Defendant is arrested, shall not be deemed ground for discharging the Defendant, or the bail; but the bail bond or recognizance of bail shall be taken with a penalty or sum of forty pounds only.

WRIT, WHEN AND HOW TO BE FILED.

11. When the rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open.

12. And the officer with whom it is filed shall endorse the day and hour when it was filed.

BAIL.

13. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the Plaintiff may treat the bail as a nullity, and sue upon the bail bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the mean time.

14. In the case of country bail, the bail piece shall be transmitted and filed within eight days, unless the Defend-

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ant reside more than forty miles from London, and in that case, within fifteen days after the taking thereof.

15. When bail to the sheriff become bail to the action, the Plaintiff may except to them, though he has taken an assignment of the bail bond.

16. It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justification.

17. If bail, either to the action or in error, are excepted to in vacation, and the notice of exception require them to justify before a Judge, the bail shall justify within four days from the time of such notice, otherwise on the first day of the ensuing term.

18. Notice of more bail than two shall be deemed irregular, unless by order of the Court or a Judge.

19. Affidavits of justification shall be deemed insufficient, unless they state that each person justifying is worth the amount required by the practice of the Courts, over and above what will pay his just debts, and over and above every other sum for which he is then bail.

20. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance.

21. Bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit; not exceeding in the whole the amount of their recognizance.

22. Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night.

23. A Plaintiff shall not be at liberty to proceed on the bail bond pending a rule to bring in the body of the Defendant.

24. No bail bond taken in London or Middlesex shall be put in suit, until after the expiration of four days; nor, if taken elsewhere, till after the expiration of eight days exclusive, from the appearance day of the process.

25. The time allowed for excepting to bail put in upon a habeas corpus shall be twenty days.

26. A recognizance of bail in error shall be taken in double the sum recovered, except in case of a penalty;

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27. In ejectment, the recognizance of bail in error shall be taken in double the yearly value and double the costs.

BAIL BOND AND ACTION THEREON.

28. An action may be brought upon a bail bond by the sheriff himself in any Court.

29. In all cases where the bail bond shall be directed to stand as a security, the Plaintiff shall be at liberty to sign judgment upon it.

30. Proceedings on the bail bond may be stayed on payment of costs in one action, unless sufficient reason be shewn for proceeding in more.

APPEARANCE.

31. A Defendant who has been served with process by original, shall enter an appearance within four days of the appearance day, if the action is brought in London or Middlesex, or within eight days of the appearance day in other cases, otherwise the Plaintiff may enter an appearance for him according to the statute; and any attorney who undertakes to appear, shall enter an appearance accordingly.

IRREGULARITY IN PROCESS AND PROCEEDINGS.

32. Where the Defendant is described in the process or affidavit to hold to bail by initials or by a wrong name, or without a Christian name, the Defendant shall not be discharged out of custody or the bail bond delivered up to be cancelled on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name.

33. No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.

34. If a party plead several pleas, avowries, or cognizances without a rule for that purpose, the opposite party shall be at liberty to sign judgment.

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DECLARATION AND TIME FOR.

35. A Plaintiff shall be deemed out of Court unless he declare within one year after the process is returnable.

36. When the Plaintiff declares against a prisoner, it shall not be necessary to make more than two copies of the declaration, of which one shall be served and another filed with an affidavit of service; upon the office copy of which a rule to plead may be given.

37. Where a cause has been removed from an inferior Court, the rule to declare may be given within four days after the end of the term in which the writ is returned.

38. It shall not be necessary for a Defendant in any case to give a rule to declare, except upon removals from inferior Courts; but the Plaintiff may have a rule for time to declare in the Court of Exchequer as in the other Courts.

39. A rule to declare peremptorily may be absolute in the first instance.

40. A declaration laying the venue in a different county from that mentioned in the process shall not be deemed a waiver of the bail.

41. It shall not be deemed necessary to express the amount of damages in a notice of declaration.

42. Where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the same term as the declaration, or of a different term.

PLEA AND TIME FOR.

43. A demand of plea may be made at the time when the declaration is delivered, and may be indorsed thereon.

44. If a Defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the Plaintiff on making up the issue or demurrer book may, if he think fit, insert it for him, but the costs of such insertion shall be in the discretion of the taxing officer.

45. If the declaration be filed or delivered so late that the Defendant is not bound to plead until the next term,

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the Defendant may plead as of the preceding term, within four days of the next term, any plea to the jurisdiction, or in abatement, or a tender, or any other similar plea.

46. The Defendant shall not be at liberty to waive his plea without leave of the Court or a Judge.

PARTICULARS.

47. A summons for particulars and order thereon may be obtained by a Defendant before appearance, and may be made, if the Judge think fit, without the production of any affidavit.

48. A Defendant shall be allowed the same time for pleading after the delivery of particulars under a Judge's order, which he had at the return of the summons; nevertheless, judgment shall not be signed till the afternoon of the day of the delivery of the particulars, unless otherwise ordered by the Judge.

NOTICES AND RULES AND SERVICE THEREOF.

49. Where the residence of a Defendant is unknown notice of declaration may be stuck up in the office, but not without previous leave of the Court.

50. Service of rules and orders, and notices, if made before nine at night, shall be deemed good, but not if made after that hour.

51. It shall not be necessary to the regular service of a rule, that the original rule should be shewn, unless sight thereof be demanded, except in cases of attachment.

52. Where a term's notice of trial or inquiry is required, such notice may be given at any time before the first day of term.

53. A rule to reply may be given at any time when the office is open.

54. Service of a rule to reply, or plead any subsequent pleading, shall be deemed a sufficient demand of a replication, or such other subsequent pleading.

PAYMENT OF MONEY INTO COURT.

55. In all cases in which money may be paid into Court, leave to pay it in may be obtained by a side bar rule.

56. On payment of money into Court, the Defendant shall undertake by the rule to pay the costs, and, in case of non-payment, to suffer the Plaintiff either to move for an attachment, on a proper demand and service of the rule, or to sign final judgment for nominal damages.

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TRIAL AND NOTICE THEREOF.

57. Notice of trial and inquiry, and of continuance of inquiry, shall be given in town, but countermand of notice of trial, or inquiry, may be given either in town or country, unless otherwise ordered by the Court or a Judge.

58. The expression "short notice of trial" shall, in country cases, be taken to mean four days.

59. In all cases where the Plaintiff in pleading concludes to the country, the Plaintiff's attorney may give notice of trial at the time of delivering his replication or other subsequent pleading, and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication, or other subsequent pleading, and the Plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and in all cases where the Defendant demurs to the Plaintiff's declaration, replication, or other subsequent pleading, the Defendant's attorney, or the Defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the Defendant pleads a plea in bar or rejoinder, &c. to which the Plaintiff demurs, the Defendant's attorney, or the Defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer.

60. Notice of a trial at bar shall be given to the proper officer of the Court, before giving notice of trial to the party.

61. In country causes, or where the Defendant resides more than forty miles from town, a countermand of notice of trial shall be given six days before the time mentioned in the notice for trial, unless short notice of trial has been given.

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62. In town causes where the Defendant lives within forty miles of town, two days' notice of countermand shall be deemed sufficient.

63. The rule for a view may in all cases be drawn up by the officer of the Court, on the application of the party, without affidavit, or motion for that purpose.

NEW TRIAL, MOTION IN ARREST OF JUDGMENT.

64. If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second.

65. No motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term.

JUDGMENT AND TIME FOR SIGNING.

66. Judgment for want of a plea after demand may, in all cases, be signed at the opening of the office in the afternoon of the day after that on which the demand was made, but not before.

67. After the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return, and after a verdict, or nonsuit, on the day after the appearance-day after the return of the distringas, or habeas corpora, without any rule for judgment.

JUDGMENT AS IN CASE OF NONSUIT.

68. A rule *nisi* for judgment as in case of a nonsuit may be obtained on motion without previous notice, but in that case it shall not operate as a stay of proceedings.

69. No motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default, but such costs may be moved for separately, (*i. e.*) without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of: or the Court on discharging a rule for judgment as in

case of a nonsuit may order the Plaintiff to pay the costs of not proceeding to trial, but the payment of such costs shall not be made a condition of discharging the rule.

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70. No entry of the issue shall be deemed necessary to entitle a Defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso.

71. No trial by proviso shall be allowed in the same term in which the default of the Plaintiff has been made, and no rule for a trial by proviso shall be necessary.

WARRANT OF ATTORNEY AND COGNOVIT.

72. No warrant of attorney to confess judgment, or *cognovit actionem*, given by any person in custody of a sheriff or other officer upon mesne process, shall be of any force unless there be present some attorney on behalf of such person in custody expressly named by him, and attending at his request to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the Defendant, and state that he subscribes as such attorney.

73. Leave to enter up judgment on a warrant of attorney above one and under ten years old, must be obtained by a motion in term, or by order of a Judge in vacation; and if ten years old or more, upon a rule to shew cause.

COSTS.

74. No costs shall be allowed on taxation to a Plaintiff upon any counts or issues upon which he has not succeeded, and the costs of all issues found for the Defendant shall be deducted from the Plaintiff's costs.

EXECUTION.

75. It shall not be necessary that any writ of execution should be signed, but no such writ shall be sealed till the judgment paper, postea, or inquisition has been seen by the proper officer.

76. A writ of *habere facias possessionem* may be sued out without lodging a præcipe with the officer of the Court,

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77. In actions commenced by bill, a *ca. sa.* to fix bail shall have eight days between the teste and return, and in actions commenced by original, fifteen, and must in London and Middlesex be entered four clear days in the public book at the sheriff's office.

SCIRE FACIAS.

78. A Plaintiff shall not be allowed a rule to quash his own writ of *scire facias*, after a Defendant has appeared, except on payment of costs.

79. A *scire facias* to revive a judgment more than ten years old, shall not be allowed without a motion for that purpose in term, or a Judge's order in vacation; nor if more than fifteen, without a rule to shew cause.

80. A *scire facias* upon a recognizance taken in Serjeant's Inn, or before a commissioner in the country, and recorded at Westminster, shall be brought in Middlesex only, and the form of the recognizance shall not express where it was taken.

81. No judgment shall be signed for non-appearance to a *scire facias* without leave of the Court or a Judge, unless the Defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one *scire facias*.

82. A notice in writing to the Plaintiff, his attorney or agent, shall be a sufficient appearance by the bail, or Defendant on a *scire facias*.

ERROR.

83. A writ of error shall be deemed a supersedeas from the time of the allowance.

84. To entitle bail to stay proceedings pending a writ of error the application must be made before the time to surrender is out.

SUPERSEDEAS.

85. The Plaintiff shall proceed to trial or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the Defendant to be charged in execution within two terms inclusive after such trial or

judgment; of which the term in, or after which the trial was had shall be reckoned one.

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86. The marshal of the King's Bench prison, and the warden of the Fleet, shall present to the Judges of the Court of King's Bench, Common Pleas, and Exchequer, in their respective chambers at Westminster, within the first four days of every term, a list of all such prisoners as are supersedeable; shewing as to what actions and on what account they are so, and as to what actions (if any) they still remain not supersedeable.

87. If by reason of any writ of error, special order of the Court, agreement of parties, or other special matter, any person detained in the actual custody of the marshal of the King's Bench prison or warden of the Fleet, be not entitled to a supersedeas or discharge to which such prisoner would, according to the general rules and practice of the Court, be otherwise entitled for want of declaring, proceeding to trial or judgment, or charging in execution, within the time prescribed by such general rules and practice, then and in every such case the Plaintiff or Plaintiffs at whose suit such prisoner shall be so detained in custody, shall, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or special matter, to the marshal or warden, upon pain of losing the right to detain such prisoner in custody by reason of such special matter, and the marshal or warden shall forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison, and shall also present to the Judges of the respective Courts from time to time a list of the prisoners to whom such special matter shall relate, shewing such special matter, together with the list of the prisoners supersedeable.

88. All prisoners who have been or shall be in the custody of the marshal or warden for the space of one calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the King's Bench or Fleet prison, as to all such actions in which they have been or shall be supersedeable.

89. The order of a Judge for the discharge of a

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prisoner on the ground of the Plaintiff's neglect to declare or proceed to trial, or final judgment, or execution, in due time, may be obtained at the return of one summons served two days before it is returnable, such order in town causes being absolute, and in country causes, unless cause shall be shewn within four days, or within such further time as the Judge shall direct.

90. A rule or order for the discharge of a debtor who has been detained in execution a year for a debt under twenty pounds, may be made absolute in the first instance on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires.

ATTORNEY AND HIS BILL.

91. An order to deliver or tax an attorney's bill may be made at the return of one summons, the same having been served two days before it is returnable.

92. One appointment only shall be deemed necessary for proceeding in the taxation of costs or of an attorney's bill.

93. No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted.

MISCELLANEOUS.

94. It shall not be necessary that a *pluries capias* be stamped by the clerk of the warrants to authorize the exigenter to make out an exigent.

95. In order to charge a Defendant in execution, it shall not be necessary that the proceedings be entered of record.

96. Side bar rules may be obtained on the last as well as on other days in term.

97. A rule may be enlarged, if the Court think fit, without notice.

98. An application to compel the Plaintiff to give security for costs must in ordinary cases be made before issue joined.

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99. Leave to compound a penal action shall not be given in cases where part of the penalty goes to the crown, unless notice shall have been given to the proper officer, but in other cases it may.

100. Where the Defendant, after having pleaded, is allowed to confess the action, he may withdraw his plea in person without the appearance of the attorney or his clerk for that purpose before the officer of the Court.

101. There shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a Judge upon summons for that purpose.

102. An order upon the lord of a manor to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance upon an affidavit that the copyhold tenant has applied for and been refused inspection.

103. In cases where the application for a rule to change the venue is made upon the usual affidavit only, the rule shall be absolute in the first instance; and the venue shall not be brought back except upon an undertaking of the Plaintiff to give material evidence in the county in which the venue was originally laid.

104. Where money is paid into Court in several actions which are consolidated, and the Plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into Court.

105. After judgment by default, the entry of any subsequent continuances shall not be required.

106. To entitle a Plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the Defendant's consent, but the rule shall contain an undertaking on the part of the Plaintiff to pay the costs, and a consent, that if they are not paid within four days after taxation, Defendant shall be at liberty to sign a *non pros*.

107. It shall not be necessary that any pleadings which conclude to the country be signed by counsel.

108. In all special Pleadings where the plaintiff takes issue on the Defendant's pleading, or traverses the same, or demurs, so that the Defendant is not let in to allege any

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new matter, the Plaintiff may proceed without giving rule to rejoin.

109. It shall not be necessary that imparlances should be entered on any distinct roll.

110. Where a pauper omits to proceed to trial, pursuant to notice, or an undertaking, he may be called upon by a rule to shew cause why he should not pay costs, though he has not been dispaupered.

II.

AND IT IS FURTHER ORDERED, That upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the Plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service and attendance to receive debt and costs, and that upon payment thereof, within four days, to the Plaintiff or his attorney, further proceedings will be stayed. But the Defendant shall be at liberty, notwithstanding such payment, to have the costs taxed; and if more than one sixth shall be disallowed, the Plaintiff's attorney shall pay the costs of taxation.

The indorsement shall be written or printed in the following form:—

“The Plaintiff claims ——— for debt, and ——— for costs. And if the amount thereof be paid to the Plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed.”

III.

AND IT IS FURTHER ORDERED, That in Hilary and Tripity Terms, a Plaintiff in any country cause may file or deliver a declaration *de bene esse* within four days after the end of the term, as of such term.

IV.

AND IT IS FURTHER ORDERED, That the rules heretofore made in the Courts of King's Bench and Common Pleas respectively, for avoiding long and unnecessary repetitions of the original writ in certain actions therein mentioned,

shall be extended and applied in the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, to all personal and mixed actions; and that in none of such actions shall the original writ be repeated in the declaration, but only the nature of the action stated in manner following: viz. A. B. was attached to answer C. D. in a plea of trespass, or in a plea of trespass and ejectment, or as the case may be, and any further statement shall not be allowed in costs.

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V.

AND IT IS FURTHER ORDERED, That upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail bond, on perfecting bail above, the attachment or bail bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented for want of special bail being perfected in due time from entering his cause for trial, in a town cause in the term next after that in which the writ is returnable, and in a country cause at the ensuing assizes.

VI.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the copy of any judgment, writ, or other public document shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission.

VII.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the hand writing to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall upon summons before a Judge, a reasonable time before the trial, (such summons stating therein the name, description, and place of abode of the intended witness,) have neglected or refused to admit such hand writing or execution, or unless

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the Judge, upon attendance before him, shall indorse upon such summons, that he does not think it reasonable to require such admission.

VIII.

AND IT IS FURTHER ORDERED, That in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Court, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

AND IT IS FURTHER ORDERED, that the above Rules shall take effect on the first day of next Easter Term.

TENTERDEN.	J. VAUGHAN.
N. C. TINDAL.	J. PARKE.
LYNDHURST.	W. BOLLAND.
J. BAYLEY.	J. B. BOSANQUET.
J. A. PARK.	W. E. TAUNTON.
W. GARROW.	E. H. ALDERSON.
J. LITTLEDALE.	J. PATTESON.
S. GASELEE.	

RULES.

Easter Term, 2 W. 4. 1832.

It is ordered, that the days between Thursday next before, and the Wednesday next after Easter Day, shall not be reckoned or included in any rules, or notices, or other proceedings, except notices of trial and notices of inquiry, in any of the courts of law at Westminster.

(Signed by all the Judges.)

Whereas, by one of the rules made in Hilary Term last past, it was, amongst other things, ordered, that the want of an *ac etiam*, where a Defendant is arrested, shall not be deemed ground for discharging the Defendant or the bail; but the bail bond, or the recognizance of bail, shall be taken with a penalty or sum of £40 only; and whereas it was not intended that the said rule should apply to writs of *quo minus*, or to other writs which heretofore have never had an *ac etiam*, it is, therefore, hereby declared and ordered, that the said part of the said rule shall extend to those writs only in which there has heretofore been an *ac etiam* clause.

(Signed by all the Judges.)

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Michaelmas Term, 3 W. 4.
2d Nov. 1832.

GENERAL RULES

AGREED UPON BY THE JUDGES IN PURSUANCE OF
 THE STATUTE 2 W. 4. c. 39.

IT IS ORDERED, That the writ of *capias* and *distringas* which shall hereafter be issued out of the superior Courts of law at Westminster into the counties palatine of Lancaster or Durham, shall be directed to the Chancellor of the county palatine of Lancaster, or his deputy there, or to the Bishop of Durham, or his Chancellor there, and shall be in the following form:—

WRIT OF DISTRINGAS.

WILLIAM the Fourth, &c.

To the Chancellor of our county palatine of Lancaster,
 or his deputy there; or

To the Reverend Father in God by
 Divine Providence Lord Bishop of Durham, or to
 his Chancellor there, greeting. We command you
 that by our writ under the seal of our said county
 palatine to be duly made and directed to the sheriff
 of our said county palatine, you command the said
 sheriff [or, if in Durham, that by our writ under the
 seal of your Bishopric, to be duly made and directed
 to the sheriff of the county of Durham, you cause
 the said sheriff to be commanded] that he omit not
 by reason of any liberty in his bailiwick, but that he
 enter the same and distrain upon the goods and
 chattels of C. D. for the sum of forty shillings, in
 order to compel his appearance in our Court of

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to answer A. B. in a plea of trespass on
the case, [or debt, or as the case may be,] and how
he shall execute that our writ he make known to us
in our said Court on the day of
now next ensuing.

Witness at Westminster,
the day of in the
year of our reign.

NOTICE to be subscribed to the foregoing writ.

In the Court of

Between { A. B. - - Plaintiff,
 { C. D. - - Defendant.

Mr. C. D.

TAKE NOTICE, That I have this day distrained upon your goods and chattels in the sum of forty shillings, in consequence of your not having appeared in the said Court to answer to the said A. B. according to the exigency of a writ of summons bearing teste on the _____ day of _____, and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said A. B. will cause an appearance to be entered for you, and proceed thereon to judgment and execution, or [if the Defendant be subject to outlawry] will cause proceedings to be taken to outlaw you.

WRIT OF CAPIAS.

WILLIAM the Fourth, &c.

To the Chancellor of our county palatine of Lancaster,
or his deputy there; or

To the Reverend Father in God by
Divine Providence Lord Bishop of Durham, or to
his Chancellor there, greeting. We command you,
that by our writ under the seal of our said county
palatine to be duly made and directed to the sheriff
of our said county palatine, you command the said
sheriff [or, if in Durham, that by our writ under the

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seal of your bishopric to be duly made and directed to the sheriff of the county of Durham, you cause the said sheriff to be commanded] that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take C. D. of if he shall be found in his bailiwick, and him safely keep until he shall have given him bail or make deposit with him according to law in an action on promises [or of debt, &c.] at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from his custody, and that he further command him, that on execution thereof he do deliver a copy thereof to the said C. D., and that the said writ do require the said C. D. to take notice that within eight days after execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of to the said action; and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning thereunder written or indorsed thereon. And that he further command the said sheriff, that immediately after the execution thereof, he do return that writ to our said Court, together with the manner in which he shall have executed the same, and the day of the execution thereof; or that if the same shall remain unexecuted, then that he do so return the same at the expiration of four calendar months from the date thereof, or sooner if he shall be thereto required, by order of the said Court or by any Judge thereof.

Witness at Westminster the
day of

MEMORANDUM to be subscribed to the writ.

N. B. This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards.

A WARNING TO THE DEFENDANT.

1832.

1. If a Defendant being in custody shall be detained on this writ, or if a Defendant being arrested thereon shall go to prison for want of bail, the Plaintiff may declare against such Defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution.
2. If a Defendant being arrested on this writ shall have made a deposit of money, according to the statute 7 & 8 G. 4. c. 71., and shall omit to enter a common appearance to the action, the Plaintiff will be at liberty to enter a common appearance for the Defendant, and proceed thereon to judgment and execution.
3. If a Defendant having given bail on the arrest, shall omit to put in special bail as required, the Plaintiff may proceed against the sheriff or on the bail bond.
4. If a Defendant having been served only with this writ and not arrested thereon, shall not enter a common appearance within eight days after such service, the Plaintiff may enter a common appearance for such Defendant, and proceed thereon to judgment and execution.

INDORSEMENTS to be made on the writ of Capias.

Bail for £ by affidavit,

or

Bail for £ by order of [naming the Judge making the order], dated the day of

This writ was issued by E. F. of attorney for the Plaintiff [or Plaintiffs] within named, or

This writ was issued in person by the Plaintiff within named, [mention the city, town, or parish, and also the

1832.

name of the hamlet, street, and number of the house of the Plaintiff's residence, if any such there be.]

N. C. TINDAL.	J. PARKE.
LYNDHURST.	W. BOLLAND.
J. BAYLEY.	J. B. BOSANQUET.
J. A. PARK.	W. E. TAUNTON.
J. LITTLEDALE.	E. H. ALDERSON.
S. GASELEE.	J. PATTESON.
J. VAUGHAN.	J. GURNEY.

IT IS ORDERED, That every writ of summons, capias, and detainer, shall contain the names of all the Defendants [if more than one] in the action, and shall not contain the name or names of any Defendant or Defendants in more actions than one.

IT IS FURTHER ORDERED, That the following fees shall be taken : —

£ s. d.

For signing all writs for compelling an appearance, whether of summons, distringas, capias, or detainer, and whether the same shall be the first writ, or an alias or pluries writ : and whether the same shall issue into the same county as the preceding writ, or into a different county - - - 0 2 6

For sealing the same - - - 0 0 7

For entering an appearance for every Defendant - - - 0 1 0

Unless an appearance shall be entered for more than one Defendant by the same attorney, and in that case for every additional Defendant - - - 0 0 4

IT IS FURTHER ORDERED, That the person serving a writ of summons shall, within three days at least after such service, indorse on such writ the day of the week and month of such service, otherwise the Plaintiff shall not be at liberty to enter an appearance for the Defendant according to the statute, and every affidavit upon which

such an appearance shall be entered shall mention the day on which such indorsement was made.

1892.

IT IS FURTHER ORDERED, That the sheriff or other officer or person to whom any writ of capias shall be directed, or who shall have the execution and return thereof, shall, within six days at the least after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof, and in default thereof shall be liable, in a summary way, to make such compensation for any damage which may result from his neglect, as the Court or a Judge shall direct.

IT IS FURTHER ORDERED, That the second rule of Hilary term 1832 shall be applicable to all writs of summons, distringas, capias, and detainer issued under the authority of the said act, and to the copy of every such writ.

IT IS FURTHER ORDERED, That any alias or pluries writ of summons may, if the Plaintiff shall think it desirable, be issued into another county, and any alias or pluries writ of capias may be directed to the sheriff of any other county, the Plaintiff, in such case, upon the alias or pluries writ of summons describing the defendant as late of the place of which he was described in the first writ of summons, and upon the alias or pluries writ of capias referring to the preceding writ or writs as directed to the sheriff to whom they were in fact directed.

IT IS FURTHER ORDERED, That the alias or pluries writ of summons into another county shall be in the following form : —

WILLIAM the Fourth, &c.

To C. D. of _____ in the county of _____
late of _____ in the county of _____
[original county]. We command you as before, [or,
often] we have commanded you, &c. [as in the writ
of summons, No. I. in the schedule of the said act].

1832. And that the alias and pluries writ of *capias* shall be in the following form : —

WILLIAM the Fourth, &c.

To the sheriff of

We command you, as heretofore we have commanded the sheriff of that you omit not, &c. [as in the writ of *capias* No. 4. in the schedule of the said act.]

IT IS FURTHER ORDERED, That in every writ of *distringas* issued under the authority of the said Act, a non omittas clause may be introduced by the Plaintiff without the payment of any additional fee on that account.

IT IS FURTHER ORDERED, That when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ.

IT IS FURTHER ORDERED, That if the Plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by the said act, to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not, on that account, be held void, but may be set aside as irregular upon application to be made to the Court out of which the same shall issue, or to any Judge.

IT IS FURTHER ORDERED, That upon all writs of *capias* where the Defendant shall not be in actual custody, the Plaintiff, at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse* in case special bail shall not have been perfected, and if there be several Defendants, and one or more of them shall have been served only and not arrested, and the Defendant or Defendants so served shall not have entered a common appearance, the Plaintiff shall be at liberty to enter a common appearance

for him or them, and declare against him or them in chief and de bene esse against the Defendant or Defendants who shall have been arrested and shall not have perfected special bail.

1832.


IT IS FURTHER ORDERED, That in case the time for pleading to any declaration, or for answering any pleading, shall not have expired before the tenth day of August in any year, the party called upon to reply, &c. shall have the same number of days for that purpose after the twenty-fourth day of October, as if the declaration or preceding pleading had been delivered or filed on the twenty-fourth day of October, but in such cases it shall not be necessary to have a second rule to plead reply, &c.

IT IS FURTHER ORDERED, That in case a Judge shall have made an order in vacation for the return of any writ issued by authority of the said act, or any writ of capias ad satisfaciendum fieri facias, or elegit on any day in vacation, and such order shall have been duly served but obedience shall not have been paid thereto, and the same shall have been made a rule of court in the term then next following, it shall not be necessary to serve such rule of Court, or make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the mean time.

IT IS FURTHER ORDERED, That if any attorney shall, as required by the said act, declare that any writ of summons, or writ of capias, upon which his name is indorsed, was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed until further order.

IT IS FURTHER ORDERED, That every declaration shall in future be entitled in the proper Court, and on the day of the month or year on which it is filed or delivered, and shall commence as follows : —

1832.

DECLARATION after Summons.

Venue. A.B., by E.F. his attorney, [or in his own proper person,] complains of C.D., who has been summoned to answer the said A.B. &c.

DECLARATION after arrest where the party is not in custody.

Venue. A.B., by E.F. his attorney, [or in his own proper person,] complains of C.D. who has been arrested at the suit of the said A.B. &c.

DECLARATION where the party is in custody.

Venue. A.B., by E.F. his attorney, [or in his own proper person] complains of C.D. being detained at the suit of the said A.B. in the custody of the sheriff [or of the marshal of the marshalsea of the Court of King's Bench, or of the Warden of the Fleet].

DECLARATION after the arrest of one or more Defendant or Defendants, and where one or more other Defendant or Defendants shall have been served only and not arrested.

Venue. A.B. by E.F. his attorney, [or in his own proper person,] complains of C.D. who has been arrested at the suit of the said A.B. [or being detained at the suit of the said A.B. as before] and of G.H., who has been served with a writ of capias to answer the said A.B. &c.

And that the entry of pledges to prosecute at the conclusion of the declaration shall in future be discontinued.

TENTERDEN.	J. PARKE.
N. C. TINDAL.	W. BOLLAND.
LYNDHURST.	J. B. BOSANQUET.
J. BAYLEY.	W. E. TAUNTON.
J. A. PARK.	E. H. ALDERSON.
J. LITTLEDALE.	J. PATTESON.
S. GASELEE.	J. GURNEY.
J. VAUGHAN.	

1892.

KING'S BENCH.

IT IS ORDERED, That all writs of summons, distringas, capias, and detainer, issued in the county of Middlesex, shall be issued, signed, and sealed, by the signer of the bills of Middlesex; and that all such writs issued in any other county or city shall be issued and signed by the signer of the writs, in the King's Bench Office, and sealed by the sealer of the writs until further Order.

J. LITTLEDALE.
J. PARKE.
W. E. TAUNTON.
J. PATTESON.



INDEX:

ACCOUNT. See EXECUTOR, and the Index to the Appendix.

ADVANCEMENT. See the Index to the Appendix.

AGREEMENT. See SPECIFIC PERFORMANCE, and the Index to the Appendix.

ANCESTOR AND HEIR. See the Index to the Appendix.

APPEAL. See PLEADING.

APPOINTMENT. See POWER.

ARBITRATION. See SPECIFIC PERFORMANCE.

ASSETS. See EXECUTOR.

A. by his will bequeathed to S. his portion in trade, certain leasehold premises, where the trade was carried on for the residue of the term and interest of the testator therein. These premises; together with other premises at H., were subject to mortgages for monies which had been raised and charged upon them by the testator; who had also given his bond for the debt.

Upon a bill filed by pecuniary legatees against the executors, to carry the trust of the will into execution, and a decree for taking the accounts of the estate, it appeared that S., who was one of the executors, had paid off the sums due upon the mortgage of the premises at T. and H. out of the personal estate, which was insufficient to satisfy all the debts and pecuniary legacies. This payment was allowed by the master in his report. The report in this respect was confirmed by order upon further directions, and upon appeal the decision was affirmed. *Davies v. Bush* - - - p. 305

ASSIGNMENT. See TRUST.

AWARD. See SPECIFIC PERFORMANCE.

BANKRUPTCY. See the Index to the Appendix.

BENEFICE. See CLERGY.

BILL OF EXCHANGE. See the Index to the Appendix.

BYE LAW. See CORPORATION.

CHARGE. See **CLERGY.** **TRUST.**

CHARTER. See **CORPORATION.**

CLERGY.

By the Irish statute 10 and 11 Car. 1. c. 2. s. 7. it is enacted that charges imposed by any parson upon his benefice shall be effectual for such time only as he shall be resident upon his benefice, without absence above eighty days in any one year, and that all covenants, bonds, statutes merchant, and of the staples, recognisance, judgments, and other like assurances made, acknowledged, or suffered by any such benefices or collaterally on his behalf for the enjoying the houses, lands, tithes, and other profits of such benefices or any part thereof, otherwise, or for any longer or other time, or whereby any such benefice shall be enforced to resign, &c. and likewise all covenants, bonds, and other assurances, made to the intent to force such beneficer to be resident for the upholding of every grant, lease, alienation, or charge, &c. shall be void to all intents and purposes. By the Irish statutes 10 and 11 Car. 1. c. 3. it is enacted that all grants, leases, alienations, charges, and incumbrances made, &c. by any archbishop or other dignitary, ecclesiastical persons, vicars, &c. of any lands, tenements, or hereditaments, parcel of their possessions, other than such leases and grants as therein or in any other act passed in the then present session of parliament authorised, shall be void.

R. W. being possessed of a certain vicarage, and also a rectory and chantorship in Ireland, in consideration of a sum of 6000*l.* advanced to him by the Globe Insurance Company, granted to them and charged upon his said benefices, an annuity of 825*l.* 5*s.* Irish currency, for a term of ninety-nine years if R. W. should so long live. By a bond and warrant of attorney of the same date with and reciting the indenture, and reciting that the annuity should be further secured by the bond and warrant of attorney. R. W. and O. W. became bound to certain trustees for the Globe Company, in a penal sum of 6000*l.* conditioned for payment of the annuity: Held, that the collateral security by the bonds was valid, although the charge on the benefice were void under the statutes. — *Wynne v. Robinson* - p. 27

COLLATERAL SECURITY. See **CLERGY.**

CONDITION.

J. D. having two sons, one of whom, T. D., cohabited with a woman called Anne Robinson in the year 1819, threatened to disinherit him unless he would break off the connection, whereupon T. D. drew up and signed a paper in the words following:—“ I hereby solemnly declare, and with due awe and reverence appeal to the great Searcher of all hearts for the truth and sincerity of this declaration, that I am not married, or in any manner contracted to the woman I have so long and so imprudently cohabited with, known heretofore by the name of Anne Robinson ; and that from this moment to the end of my existence, I will have no kind of communication with her, directly or indirectly, and I am satisfied to be no longer acknowledged by my father as his son, and in the estimation of the world, not to have any further claim to that title than while I strictly adhere to this declaration in the fullest sense, and to the true spirit and meaning of it, and from the moment I deviate from it in any degree, may I be renounced by him and by all : and I hereby call upon such trustees and executors as my father may appoint to carry into effect the final distribution of his property, to withhold from me all and every part of whatever bequest he may think proper to make in my favour, and not to consider me as the object he had in view whenever I cease to support this solemn declaration. Given under my hand this 15th day of August, 1819, (signed) Thomas St. John Dillon.”

Anne Robinson also signed a declaration in the words following :—“ I do hereby solemnly declare that I am not married, or in any manner contracted to the above named Thomas Dillon, and I do solemnly and sincerely promise that I will not from henceforth have any connection, communication, intercourse, or correspondence whatever with him directly or indirectly. Given under my hand this 15th day of August, 1819, (signed) Anne Robinson.”

The declarations were attested by a witness, who proved that they were placed in the hands of J. D.

J. D., by his will, dated in November, 1819, devised and bequeathed all his property upon trust to invest the produce in the public funds, or securities as therein men-

tioned, and out of the interest thereof, after paying a yearly allowance to his wife, Catherine Dillon, for her life, " upon trust to permit and suffer my eldest son, " Thomas St. John Dillon, to have, receive, and take " out of the interest of such stock or securities that will " remain after payment of the said annuity, to my said " wife, one moiety of such interest to be paid to him by " half yearly payments, whilst he strictly adheres to the " solemn engagement he has entered into, never to associate with, or have any further knowledge of Anne " Robinson, and which engagement signed by him, I " have put into the hands of my said trustees and executors, to be safely kept, so that it may be forth coming when necessary; and as my said son, Thomas, has " expressed his opinion to me at present, that to prevent " the possibility of the continuance, or renewal of such " a connection, it is necessary for him to absent himself " from this country for some length of time, and that he " is determined to do so, as soon as he conveniently can, " after my decease, this restriction is not to be considered in full force, or to be acted upon until after his " departure for such purpose, provided, it be within three " months after my decease, and I have allowed this latitude lest she should, while he continued in Ireland, " intrude herself on him, and by such, or other acts " cause a forfeiture of his claims under this my will, and " should it fully appear that at any time after the said " period he may happen to break through this engagement, then all benefit that it was intended he should " derive, under this will shall cease, and be done away, " and the property so bequeathed to him shall go as " herein-after directed, as in case of his dying unmarried, and without lawful issue, and upon further trust, " to permit and suffer my younger son, James Dillon, to " have, receive, and take the remaining moiety of the " said interest, on the said stocks or securities to be " paid to him, or to his order, legally authorised to " receive the same by half-yearly payments, and on this " further trust, to give, pay, or cause to be paid, to my " said sons, Thomas St. John Dillon and James Dillon, " on their respective days of marriage, such marriage to " be with the consent of my said trustees, and of my " executors, or of the majority of them, the full amount " of the moiety to each of the monies so funded, or

"secured, and in case either of them marry without such consent, or should die without having been married with such consent, then the interest of the moiety to which the person so marrying, or dying was entitled, under this my will, to go to the other or surviving brother, during his life, and after his death, the principal sum to go to his lawful issue, if any, in such, manner, proportion, and under such restrictions and at such periods as he by will or deed may direct or appoint; and in case both of my said sons should so die unmarried, and without leaving lawful issue," then he gave the interest of the estate for life to certain relations, and finally to certain charitable institutions. The will concludes in these words: "And I do hereby appoint my said trustees and executors to be the sole judges of the future conduct of my said sons, and they, my said trustees and executors, and they only, are to decide on what may amount to a forfeiture of the benefits to be derived under this my will."

In 1821, T. St. John D. married Anne Robinson, having asked and obtained the assent of the trustees to a marriage with a person represented by him, to be Mary Anne Madden. One of the trustees had given a general consent to the marriage, but the majority of the executors and trustees had consented specifically to a marriage with Mary Anne Madden, described as "only surviving daughter of Andrew Madden of Dunleary, Esq.," and it was proved that Andrew Madden, who, upon the marriage gave away Anne Robinson as his daughter, had a legitimate daughter whose name was Mary Anne Madden, and who was unmarried.

Half the funds were paid to T. St. John D. by the trustees and executors upon the marriage.

In 1822, T. St. John D. filed a bill in the Court of Chancery in Ireland against the trustees and executors, and the devisees in remainder stating the will, and that he had complied with the conditions, that he had not since his father's death had any acquaintance with Anne Robinson, and had married Mary Anne Madden, with the consent of the trustees and executors, and praying that the trusts might be carried into execution.

On the 9th of December, 1824, T. St. John D. died, leaving Anne Dillon (Robinson), with whom he had cohabited from the time of his marriage, and to whom

by the name of A. H. Robinson, otherwise Dillon, be bequeathed all his property by will, but he left no issue.

On the 23d of December, 1824, Anne Dillon, otherwise Robinson, as the representative of T. St. John D. filed an original bill in the Court of Exchequer in Ireland, against the trustees and executors, containing nearly the same statements and prayer as the bill of T. St. John D.

In their answer to this bill the trustees and executors stated, that they believed that T. St. John D. had complied with the directions and conditions of his father's will, and that otherwise, they would not have consented to his marriage.

James Dillon, the other son of the testator, died before his father, never having been married.

In the Court below a decree was made in favour of the plaintiff, Anne Dillon, otherwise Robinson; but this decree was reversed on appeal, and the following points were decided: 1. That the declaration of T. St. John D. was not admissible in evidence as part of the will. 2. That "and" in this will could not be constructed "or." 3. *Semb.* That the word, "associate" in the will did not prohibit marriage; but 4. That T. St. John D. had not contracted a valid marriage with such consent as was requisite, and that therefore the estates limited over on his dying unmarried, and without issue vested in the devisees in remainder. — *Dillon v. Harris* - p. 321

CONSTRUCTION. See MARRIAGE SETTLEMENT, and the Index to the Appendix.

CORPORATION.

To an information in the nature of a *quo warranto*, against W. a burgess of the borough of Chepping Wycombe, the Defendant in two of his pleas stated a custom, under which the mayor and common council of the corporation by right elected the burgesses. By a third plea a charter was set forth, granted by Charles II., whereby he ordered, that one of the most honest and discreet of the burgesses should be elected, as in the letters patent directed, to be mayor, and two honest and discreet burgesses to be bailiffs, and twelve discreet burgesses residing in the borough to be aldermen; that the mayor, bailiffs, and burgesses of the borough, and their successors, or the major part of them, should, from time to time, for ever elect such other men as to them should

seem most expedient to be burgesses; and that the aldermen and bailiffs should be, and be called the common council of the borough; and that the mayor, aldermen, and bailiffs for the time being, &c., should have power from time to time to make such reasonable laws, statutes, and ordinances as to them should seem good and necessary, according to their sound discretion, for the good rule and government of the burgesses, artificers, &c. inhabitants of the borough, and for declaring in what manner the members of the corporation and inhabitants of the borough should behave and conduct themselves in their offices, mysteries, and businesses, and for the good rule and victualling the borough, and for letting the borough lands, and other matters concerning the borough; and that they should have power to impose fines for non-compliance with the bye-laws. The plea then set forth, the manner prescribed by the charter for electing the mayor and bailiffs. The plea then stated the acceptance of the charter, and that, in the year 1675, the then mayor, bailiffs, and burgesses made a bye-law, (not extant in writing,) that from thenceforth the mayor and common council of the borough, or the major part of them, should, by themselves, and without the concurrence of the other burgesses, choose such persons as they should think fit to be burgesses of the borough, which bye-law had ever since been observed, and was still in force. The plea then stated, that W. had been elected according to the bye-law.

By replication to the first and second pleas the charter was set out, and it was averred that, according to the charter, the burgesses had ever since been eligible, and of right ought to have been elected by the mayor, bailiffs, and burgesses at large. To the third plea a general demurrer was put in.

The rejoinder alleged, that the charter was not duly accepted as to that part which directed that the mayor, bailiffs, burgesses, &c. should elect burgesses. To this there was a special demurrer, on the ground that a charter could not be accepted in part without special authority for such partial acceptance.

The Defendant joined in demurrer, and upon argument judgment was given for the crown upon the first and second pleas, and for the Defendant upon the third.

Upon a writ of error against the judgment upon the third plea, it was held, affirming the judgment of the Court below, that the bye law stated in the third plea was legal and valid. *The King v. Westwood* - - - p. 213.

COSTS. See **EXECUTOR.**

COVENANT. See **MARRIAGE SETTLEMENT.** **TRUST.**

EJECTMENT FOR NON-PAYMENT OF RENT. See **LANDLORD AND TENANT.** **LESSOR AND LESSEE.**

ELECTION. See the Index to the Appendix.

EQUITY. See **LANDLORD AND TENANT.** **LESSOR AND LESSEE.**

EVIDENCE. See **CONDITION.** **PLEADING.** **TITHES.**

The act of the 37 H. 8., after reciting that divers variances, contentions, and strifes had grown within the city of London, between the parsons, vicars, and curates, and the citizens and inhabitants, touching the payment of tithes, oblations, and other duties, for appeasing whereof as well the said parsons, vicars, and curates as the citizens and inhabitants had compromitted and put themselves to stand to such order and decree touching the premises as should be made by the archbishop of Canterbury and the several other persons therein named, for a final end and conclusion to be had and made touching the premises for ever, it was enacted, that such order and direction as should be made, decreed, and concluded by the archbishop, lords, and knights therein named, or any six of them, before the 1st day of March then next ensuing, concerning the payment of the tithes, oblations, or other duties within the said city or liberties, and enrolled in the King's High Court of Chancery of Record, should stand and remain and be as an act of parliament, and should bind as well all citizens and inhabitants of the city and liberties for the time being, as the said parsons, vicars, curates, and their successors for ever, according to the effect, purport, and intent of the said order and decree so to be made and enrolled.

In a suit instituted by the impropriate rector of the parish of St. Helen's, Bishopsgate, against the occupier of a house within the parish, claiming payment by way of composition, as under a decree made in pursuance of the act, it appeared that, at various times from the date of the act to the time of filing the bill, decrees and orders had been made in all the Courts at Westminster

Hall, and in the House of Lords, upon the supposition or presumption that a decree according to the act had been made and enrolled, but no proof of such enrolment was produced in the cause, and the Defendants to the suit proved that the records had been searched, and that no such enrolment was to be found.

Upon these pleadings and evidence an issue was directed in the Court below, to try whether the decree mentioned in and authorised to be made by the statute was duly enrolled according to the provisions in the statute.

This order was reversed upon appeal, and it was declared that if to give effect to the statute it was necessary that the decree should be enrolled, it ought to be presumed that the decree had been duly enrolled. — *Macdougall v. Purrier* - - - - - p. 433

EXECUTION. See **POWER.**

EXECUTOR. See **ASSETS.**

W., a solicitor, having been appointed and acting as an executor in the administration of the affairs of the estate, brought and defended many suits in which he employed himself as the attorney. Upon a bill filed by the residuary legatees against the executor, it was referred to the Master to enquire whether any money due to the estate had been lost by the negligence of W., and whether the suits had been properly commenced, prosecuted, and defended; and that he should tax the costs for business done by W. as attorney in those suits, *without prejudice* to the question whether W., being an executor, was as an attorney to be allowed such costs, except so far as he had disbursed money. Upon this decree the Master reported that some of the suits had been properly commenced, but negligently conducted, so that the recovery of the property in question in those suits had been probably endangered, and he made no allowance of costs to the executor, but submitted to the Court whether the claim for costs should not be suspended until the debts should be recovered, &c. Exceptions taken to this part of the report were by the decree on further directions overruled, and on appeal this part of the decree was affirmed.

By the decree upon further directions it was also ordered that interest should be charged upon all balances in the hands of the executor at the end of every year, and that interest should be charged against the residuary

legatees upon all advances made to them by the executor from the times of the advances. Upon appeal, this order was varied, by declaring that the Master should be directed in taking the accounts to make a rest, and state the balance at the end of each year, and to charge the executor with interest on such balance, and to apply such interest as might be so found due from him in each year, in the first place towards his future payments, before any application should be made of the balance of principal money in his hands.

Whether an executor being a solicitor, and acting as such in the administration of the estate, by bringing or defending suits or otherwise, is entitled to an allowance for costs in respect of his professional labour beyond costs out of pocket; and if so, whether as between solicitor and client. *Quære. — Carmichael v. Wilson*

p. 145

FELONY. See INSURANCE.

INSURANCE.

In the year 1815, a contract called a policy of insurance was made by F. with the Amicable Insurance Company, by which F. agreed to pay 128*l.* 15*s.* yearly to the society, according to the provisions of the bye-laws, and in consideration of these payments F. was admitted a member of the society, who bound themselves and their successors to pay to the executors, administrators, or assigns of F. such a share of the joint stock as should become due upon his death, according to the charter and bye-laws of the society. The annual payments were made by F. to the society fourteen years. In 1820 F. assigned all his interest under the policy, without consideration, upon certain trusts for a nominee in the indenture of assignment. In 1824 F. was convicted of felony and executed, having the day before his conviction been declared a bankrupt.

Upon a bill filed by his assignees against the society, the nominee and the trustees claiming the benefit of the policy. Held, in the Court below, that they were entitled to the relief prayed. But this decision was reversed on appeal, upon the ground that the contract was against public policy, and must be considered and construed as if a clause had been inserted in terms insuring against the event of the commission of a capital felony by the party insured. — *Amicable Society v. Bolland*

p. 194

INTEREST. *See* EXECUTOR.

ISSUE. *See* EVIDENCE. TITHES.

LANDLORD AND TENANT. *See* LESSOR AND LESSEE, and the Index to the Appendix.

By the Irish statute 11 *Anne*, c. 2. it is enacted, (s. 2.) that when more than half a year's rent is in arrear upon a lease, the landlord or lessor may, without demand or re-entry, serve a summons in ejectment for recovery of the demised premises: and upon proof of the fact that more than half a year's rent was due when the summons was served, and that no sufficient distress was to be found on the premises, shall recover judgment and execution; and if the lessee or person claiming under the lease shall suffer judgment to be recovered, and execution executed without paying the rent in arrear with costs, or without filing a bill for relief in equity within six months after execution executed, the lessee, &c. shall be barred from all relief in law or equity, &c. and the landlord, &c. shall hold the premises discharged from the lease.

The Irish statute 4 G. 1. c. 5. recites the former statute, and the difficulty of proving the want of sufficient distress, and thereupon enacts (s. 2.) that when one year's rent shall be in arrear upon a lease, although there be a sufficient distress upon the land to answer the rent in arrear, the landlord or lessee may serve a summons in ejectment, and upon proof that one year's rent was in arrear and due, before the service of the summons, shall recover judgment and have execution, and if the lessee, &c. shall not pay the rent in arrear with costs to be ascertained as in the act provided, or depositing the same in a Court of Equity, on filing a bill within six months after execution executed, he shall be barred from all relief or remedy in law or equity, &c., and the landlord shall hold the premises discharged from the lease.

The Irish statute 8 G. 1. c. 2., reciting the former statutes, (s. 4.) that where any lease for avoiding of which an ejectment is brought shall before the bringing of the ejectment have been mortgaged for a valuable consideration, and the lessee and mortgagee, and their respective assignees shall be served with summons in the ejectment, and affidavits of the summons made and filed, and the Plaintiff shall obtain judgment and execution in the

ejectment, if the mortgagee or assignee shall not within nine months after execution executed pay, or tender to the landlord or lessor the rent in arrear, and costs to be ascertained as in the former acts provided, the mortgagee or his assignee shall be barred of all relief and remedy in law or equity, on account of the mortgagee, and the landlord or lessor shall hold and enjoy the premises discharged from the mortgage, and the equity of redemption.

In the case of a lease subject to a mortgage the landlord having recovered judgment, &c., according to the statutes against the lessee, who did not within six months pay or tender; but where the representatives of the mortgagee before the lapse of nine months after execution executed, paid the rent in arrear and costs: Held that the benefit of that payment enured to the lessee as well as the representatives of the mortgagee.

A suit having been instituted against the landlord by the representatives of the mortgagee to have the benefit of the lease, an account was directed of what was due for rent and costs. In this stage of the cause the representatives of the mortgagee entered into an agreement with the landlord and executed a deed, by which they covenanted not to claim the equity of redemption of the lease.

Upon a bill filed by the representatives of the lessee and mortgagor against the landlord and representatives of the mortgagee to have the benefit of the suit, and to carry on the accounts: Held, that the agreement between the landlord and the representatives of the mortgagee was incompetent and invalid, and that the representatives of the lessee were entitled to the benefit of the suit and the account. *O'Reilly v. Fetherston* - p. 161

LEASE. See LANDLORD AND TENANT. LESSOR AND LESSEE. TRUST.

LEGACY. See CONDITION.

LESSOR AND LESSEE.

B., the assignee of certain leases of lands in Ireland for long terms of years, being in arrear for rent, suffered judgment to be recovered on ejectment by the lessor, and possession of the lands was delivered by writs of *habere* on the 18th of July, 1823. By the Irish statute, 4 G. 4. c. 5. s. 9., a court of equity is empowered to annul the proceedings in ejectment, and restore the possession to the lessee, if a bill is filed and the amount

of rent and costs paid into Court within six calendar months after execution has been executed in the ejectment. On the 17th of January 1824, B. filed a bill in the Exchequer to redeem the lands, and obtained an order dated on the 17th of January, and signed by one of the Barons of the Exchequer, to lodge the amount of rent in arrear and costs in the bank of Ireland. The order was left with the accountant-general on the 17th after the bank was shut. On Monday the 19th of January the money was paid into the bank, and the accountant-general gave a certificate accordingly. A treaty for a compromise then took place, and was for some time pending.

On the 7th of May 1825, on the motion of B., it was ordered that the order for lodging the rent and costs should be entered as of the 17th of January; and that the lodgment of the money should be receipted on that day instead of the 19th, and that a certificate should be granted accordingly by the accountant-general.

On the 7th of July 1825, the lessor obtained an order to take out of Court, without prejudice to the rights of the parties, the rents and costs which had been deposited, and that he might be at liberty to proceed in the recovery of the lands.

Having under this order taken the money out of Court, the lessor appealed against the order, directing the alteration in the date of the payment of the rent and costs.

The order was reversed. — *Vesey v. Bodkin* - p. 64

MARRIAGE. See **CONDITION.**

MARRIAGE SETTLEMENT.

Under an order of reference to one of the Masters of the Court of Chancery, B., who proposed to marry C., a ward of the Court, sent in a statement of facts and proposals, in which he stated that under the will of his grandfather he was tenant in tail in remainder after the death of his two brothers without issue, of divers manors, &c. of the value of 10,000*l.* a year, and in the event of his brother G. dying without issue male, or becoming entitled to the said manors, &c. under the will of his grandfather, he B. was entitled under the will of M. B. his grandmother to a life estate, with remainder to his first and other sons in tail male, in certain manors and lands of the value of 5000*l.* a year, and thereupon he proposed to settle to the uses of the marriage a sum of 2000*l.*

sterling to which he was entitled in possession, and to covenant that in case either of the limitations in his favour contained in the wills of this grandfather or grandmother should take effect, he would, in twelve months next after coming into possession of the estates thereby devised, convey so much thereof as should be of the clear annual value of 1500*l.* to trustees in trust, to pay to C. (the intended wife) in case she should survive him, so much of the rents as with her own fortune would make up a jointure of 2000*l.* per annum; and to charge the estate so to be conveyed with the payment of 8000*l.* in addition to the fortune provided for younger children; and upon the same ultimate trusts as the 2000*l.* then proposed to be assigned and subject thereto, to limit the estate to the first and other sons of the marriage in tail male, &c.

By an indenture of marriage settlement made upon the bases of these proposals, and under the authority of an order of the Court, B. assigned 2000*l.* to trustees upon the trusts specified in the proposals, and then after covenanting to settle the estates of the wife, if and when they should vest according to the proposals and orders, it was farther witnessed that in pursuance of the order confirming the report on the proposals, and in consideration of the marriage, and the settlement of the fortune of the intended wife, B. the intended husband covenanted that "in case at any time during his life he should, under the limitations contained in the wills of his grandfather and grandmother or in either of them, or otherwise become seised or entitled to all or any of the manors, &c. thereby devised for any estate of inheritance in possession, or otherwise capable of being settled or bound in law or equity, he would, within twelve months after he should become so seised, convey and settle so much of the said manors, &c. as would be of the yearly value of 1500*l.* upon the trusts specified in the proposals and orders." But as to the 8000*l.* additional portion for younger children mentioned in the proposals, no notice was taken in the indenture of settlement.

J. the brother of B. upon the death of his grandfather's widow, came into possession as tenant in tail of the lands devised by the will of the grandfather, and suffered a recovery of those lands declaring the use to himself in

fee simple ; and upon the death of G., another brother, B. came into possession as tenant for life, under the will of his grandmother, of the lands devised by her will.

Of the marriage between B. and C. there was issue a son and a daughter.

Upon a bill filed against B. on behalf of the daughter (an infant), to have the sum of 8000*l.* raised by sale or mortgage of the interest of B. in the lands devised to him by the will of his grandmother :

Held, that the event upon which those lands were charged with the sum of 8000*l.* had not happened. *Willis v. Robinson* - - - - - p. 101

MERGER. See TRUST.

MODUS. See TITHES.

MORTGAGE. See ASSETS. LANDLORD AND TENANT.

PARTIES. See LANDLORD AND TENANT. PLEADING.

PARSON. See CLERGY.

PLEADING. See CORPORATION. EVIDENCE. TITHES.

A bill having been filed by the devisees under a will to revive and have the benefit of a suit instituted by the testator to set aside a conveyance and mortgage of lands, on appeal against the decree and order on further directions in this suit, it appeared that there was a subsequent will, and that R.G., one of the Appellants, the devisee under that will, was not a party to the suit, but that an agreement had been made between him and the parties to the suit and appeal, that the proceedings should be carried on for the benefit of the party who should appear to be entitled. Upon the hearing of the appeal it was adjourned, with liberty to make R.G. a party to the revived suit. Whereupon R.G. filed a bill against all the parties, including an assignee under his insolvency, setting up the second will, and claiming as executor and devisee the benefit of the former proceedings. By the decree upon the hearing of this suit, the benefit of the former decree and proceedings was given to R.G. as executor, but *quâ* devisee his bill was dismissed, and it was also dismissed as against the assignee under his insolvency.

Under these circumstances the case again came on by appeal, but was again adjourned, with liberty to supply the defect of parties under the decree, there being neither devisee nor assignee before the Court.

Some years after this adjournment a bill was filed by R.G.

and his assignee, stating that the Defendants in the revived suit were cognisant of the second will and its contents, and the agreement between the original Plaintiffs in the suit and R.G., and that with this knowledge they acquiesced in those proceedings, and on that ground praying the benefit of the original decree and the former proceedings. The fact of knowledge and acquiescence was denied by the answers, and not proved in the cause. The bill was dismissed on the ground of this defect of proof, and the decree affirmed on appeal. Whether (if the allegations had been sustained by proof,) an agreement not stated in the pleadings, but kept out of the view of the Court, could, under these circumstances, have been carried into effect by the decree of the Court, and whether there was between the Plaintiff in the original and supplemental suits such privity as to entitle the latter to the relief obtained by the former. *Quære.* — *Franklyn v. Latouche* - p.50

PERSONAL ESTATE. *See* **ASSETS.** **EXECUTOR.**
POWER.

S. S. was seised of lands in the county of Surrey, as to one moiety in fee by descent. The other moiety was limited to her for her life, with a power to appoint an estate in fee by deed or will, with remainders over in default of appointment. **S. S.** by her will devised all her freehold estates in the county of Surrey to **J. R.** for life, on the condition that out of the rents he should keep them in repair. At his death the lands chargeable with an annuity were by this will devised to the children of **J. R.**, with remainders over. **S. S.** died, leaving **J. R.** surviving, and she at the respective times of making her will and her death had no other lands in Surrey but those before stated. Upon the argument of a special verdict stating these facts, held, in the Court of Common Pleas, that this was an execution of the power; but this judgment was reversed in the Court of King's Bench, and the judgment of the King's Bench was affirmed on a writ of error. — *Roake v. Denn* - - p.1

PRACTICE. *See* **ASSETS.** **EVIDENCE.** **EXECUTOR.** **LESSOR AND LESSEE.** **MARRIAGE SETTLEMENT.** **PLEADING.** **TITHES.**

PRESUMPTION. *See* **EVIDENCE.**

PROPOSALS. *See* **CONSTRUCTION.** **MARRIAGE SETTLEMENT.** **WARD OF COURT.**

PUBLIC POLICY. *See* INSURANCE.

QUO WARRANTO. *See* CORPORATION.

SOLICITOR. *See* EXECUTOR.

SPECIFIC PERFORMANCE.

M. being possessed of a house and lands for a term of years, under a lease by the covenants of which he was bound to keep and deliver up the premises in repair at the expiration of the term, entered into an agreement with C., who had acquired the reversion in the premises, subject to the term that C. should grant to him a new lease, and thereupon an agreement between M. and C. was executed, whereby C. agreed to grant to M. a lease of the premises for a term of forty-seven years at such yearly rent as should be put upon the same by two chosen arbitrators; and in case of difference between them, that an umpire should be named by them, and the rent fixed by a majority of the three.

The arbitrators having differed, an umpire was called in, who, with the arbitrator for M., the tenant, received evidence to shew that at the date of the agreement between M. and C. the premises were in a very ruinous state, and that it would require 800*l.* to put them in repair.

Upon this view of the case, and assuming, as the basis of their award, that M. was not bound to repair, and that he had agreed to expend 800*l.* in repairs, they adjudged and awarded that a rent of 60*l.* per annum should be paid by M. to C. during the term of forty-seven years. But the arbitrator for M., the tenant, had differed from the umpire as to the amount of rent, and refused to concur in a larger rent than 43*l.* until he was prevailed on by the entreaty of M.'s wife to concur with the umpire in fixing the rent at 60*l.*

Held, on appeal, reversing the decree in the Court below, that M. was not entitled to a specific performance of the agreement under the circumstances attending this award.—*Chichester v. M'Intire* - - - p. 78

STATUTE OF 37 HENRY VIII. *See* EVIDENCE.

TITHES. *See* EVIDENCE.

S., as vicar of A., filed a bill in equity, stating a title by endowment, usage, or otherwise, and claiming against the occupiers of certain farms all tithes except of corn and grain. The Defendants, by answer, admitted that S. was vicar, but stated that they did not know whether

he was entitled by endowment, or usage, or otherwise, to all the tithes except grain, or to what tithes he was entitled except as after mentioned, and then they set up a modus which they stated to be payable in respect of their farms in lieu of all tithes belonging to the vicarage. No proof of the endowment was given on the part of the vicar, nor of any perception of tithes. On the contrary, it was proved that no tithes had been rendered in kind for thirty years before the commencement of the suit, but that a sum of 37*l.* had been paid to the vicar for the tithes of the farms occupied by the Defendants. At the hearing an issue was directed to try the validity of the modus.

This order was affirmed on appeal. — *Denchfield v. Strong* - - - - - p. 136

TRUST.

If a leasehold estate is assigned by way of mortgage, the assignee, unless there is a special provision to the contrary, takes the interest subject to all the covenants and obligations of the original lessee.

B. N. having an interest in lands which he held subject to head rents under the see of Kilmore for terms of years, renewable periodically on the payment of fines granted under leases at certain annual rents, and subject to fines for renewal; and he covenanted with the sub-lessees to renew the under leases as often as he should obtain renewals from the see of Kilmore, the sub-lessees paying all head rents and renewal fines.

The interest in these under leases vested in R., who assigned and conveyed to a trustee his interest in the terms, together with other lands, to secure the payment of annuities which he had granted to F. The trust as to the leases was first to pay the rents and fines, and then the annuities.

The interest of B. N. in the leaseholds was mortgaged and sold under a decree of foreclosure, and finally assigned to H. in August, 1814. In September, 1814, the interest of R. in the under leases was assigned to H., as purchaser, under a commission of bankrupt.

In 1815, the annuitants filed a bill praying a sale of the lands charged with the annuities, and payment subject only to the head rents, and afterwards, upon discovery that the leases had expired, a supplemental bill was filed against H. praying that they might be renewed upon

reasonable terms. Upon a reference under the decree, the Master having found that the rents and fines paid by H. and the lessees under the see for renewals, were a charge upon the lands prior to the annuities, his report was in this respect over-ruled by the Court upon exceptions, and upon a second report, the Court below held, that the annuities were a charge prior to the fines. But this decree was reversed upon appeal.

In such a case the covenant does not run with the land, but is personal, and the right under the lease to deduct the rent and fines is not merged by the union of the principal and underleases in the same person.—*Haig v.*

Homan - - - - - p. 380

WARD OF COURT. *See* MARRIAGE SETTLEMENT.

WILL. *See* ASSETS. CONDITION. EXECUTOR.

INDEX TO APPENDIX.

ACCOUNT. *See* PLEADING. PRACTICE. PRINCIPAL AND AGENT.

ADVANCEMENT.

Upon a sale of lands in Scotland by agreement, under which the price is by the conveyance made a charge upon the lands and a bond given by the purchaser (but not delivered), by which the purchase money is secured to the vendor for life, and upon his death to his sons and their heirs, the trustee under a sequestration of a surviving son held entitled in his right to sell his interest in the bond, subject to the liferent of the father.—*Spence v. Ross* - - - - - p. 510

AGREEMENT. *See* CONTRACT. PLEADING.

ANCESTOR AND HEIR. *See* ADVANCEMENT. BANKRUPTCY.

BANKRUPTCY. *See* ADVANCEMENT.

The adjudication under the Scotch Bankrupt Act, 54 G. 3. c. 137. operates as diligence for the creditors of the ancestors, so that it is unnecessary for them to take any proceeding under the statute of 1661, to give them a preference over the creditors of the bankrupt heir.—*Bennet v. M'Lachlin* - - - - - p. 529

BILL OF EXCHANGE. *See* PRINCIPAL AND AGENT.

CHILD. *See* ADVANCEMENT.

CONSIDERATION. *See* ADVANCEMENT.

CONSTRUCTION. *See* CONTRACT. WILL.

CONTRACT. *See* PLEADING.

By the draft of a contract originally made between a joint stock company and their manager, it was provided that the manager shall not be removed without the concurrence of the whole committee of management, and that upon removal he shall receive such compensation as the committee shall adjudge, but the contract was not signed. A new contract was afterwards signed, by which the manager was removeable by a majority consisting of two

thirds of the committee, in which new contract there was no provision for compensation upon removal. The manager was removed by a vote of two thirds of the committee: Held, that the removal was valid, and that no compensation could be recovered, either under the contract, or by implication of law.—*The Commercial Bank of Scotland v. Pollock* - - - - p. 543

COSTS. See LUNACY.

DEBTOR AND CREDITOR. See PRINCIPAL AND SURETY.
ELECTION.

Money vested in heritable bonds becomes real estate, and where upon the construction of the will no clear intention can be collected to pass real estate, the heir at law taking a benefit under the will is not put to his election, but may take the real estate as heir, and also, the personal estate, under the will.—*Trotter v. Trotter* p. 502

EXECUTOR. See PRACTICE.

FOREIGN DECREE. See PRACTICE. WILL.

HEIR AND ANCESTOR. See ANCESTOR AND HEIR.

INQUISITION. See LUNACY.

LANDLORD AND TENANT.

Under a lease commencing at Whitsuntide, as to the natural grass lands, and as to the arable lands, at the severing of the crops, the tenant being bound to consume the straw upon the land, and sufficiently to cultivate and manure them, the tenant is entitled to the value of the dung made between Whitsuntide and harvest, and left upon the land, and the landlord having at Whitsuntide taken the straw upon the farm, which was no more than was requisite for feeding the cattle between that time and the severance of the crops, is bound to pay the value of it to the tenant.—*Allan v. Berry* - - - p. 520

LUNACY.

By the law of Scotland an *interim curator bonis* (committee of the estate) may be appointed by the Court of Session without notice to the party affected by the appointment, and without cognition or inquest before a jury.

Whether the word "*interim*" means until the patient recovers his faculties, or until some more regular proceeding is instituted quære.

By the laws of Scotland a man of weak understanding may appoint interdictors by a deed which binds him to do no

act affecting his estate without the consent of the persons appointed interdictors.

Interdictors so appointed having instituted proceedings in the Court of Session to recall a subsequent appointment of an *interim curator* which was sustained with costs against the interdictors. Held, after a remit to ascertain the practice of the Court of Session, that the judgment should be affirmed, but without costs. — *Dickson v. Graham* - - - - - p. 592

OATH OF PARTY.

J. R. being the drawer, and A. R. the acceptor of a bill of exchange upon which the money due was paid by M., and the bill assigned to him. An action having been brought by him against A. R. the acceptor, to recover the amount paid, and A. R. having proposed a reference to the oath of J. R. as a party, to prove that no consideration was given for the bill. Held, that the Court of Session, under the circumstances, having a discretion, properly refused to permit such reference.

If J. R. had been the Plaintiff in the action, *semble*, that he might have been examined at the instance of the Defendant. — *Ritchie v. Mackay* - - - p. 535

PLEADING.

An agreement liable to be impeached for fraud, cannot be made void in a suit for an account without legal process to have it declared void. — *Gordon v. Brown* - p. 569

POWER OF ATTORNEY. See PRINCIPAL AND AGENT.

PRACTICE. See OATH OF PARTY. WILL.

A., who was domiciled in America, gave to B., one of his sisters, one fourth of the residue of his property for her life, subject "at her death to be equally divided amongst her children, should she have any." Upon a suit in the proper court in America, B. having no children, it was decreed that the fund should be paid to her. The decree was made upon a bill taken *pro confesso* against parties who were out of the jurisdiction, there being two executors within the jurisdiction upon whom the decree operated. One of these absent Defendants having received the funds of B. under a power from her upon a suit against him for an account, and on an objection raised that B. was entitled to no more than a life interest under the will, it was held that such a question could only be raised by proceeding in the

Court in America to rehear the cause.— *Gordon v. Brown* - - - - - p. 569

Upon a question arising in the Court of Session on the doctrines of the law of England, the Court is justified in taking and acting upon the opinions of English lawyers given upon a case laid before them.— *Trotter v. Trotter* - - - - - p. 502

PRINCIPAL AND AGENT.

A bill drawn by an agent after the death of his principal, *bonâ fide*, and without notice, held to be valid by the law of Scotland.— *Campbell v. Anderson* - p. 513

PRINCIPAL AND SURETY.

A guarantee of monies advanced by a firm consisting of F. and Co., will not extend to a new firm in which H. is introduced as a partner.— *Spiers v. Houston's Executors* - - - - - p. 515

Payments made by the principal after the alteration of the firm, and in transactions with him, are applicable to the extinction of the balance due to the old firm at the date of the alteration.— *Spiers v. Houston's Executors* - - - - - p. 515

REAL ESTATE. See ELECTION. WILL.

REVOCATION. See PRINCIPAL AND AGENT.

SALMON FISHERY.

Fishing with stake nets on the sea coast near the mouth of a river is not prohibited either by the statute or the common law of Scotland.— *Earl of Kintore v. Forbes* p. 485

STAKE NETS. See SALMON FISHERY.

WILL.

A will must be construed according to the law of the country where it is made and the testator is domiciled. The will of a subject of Great Britain, made in India, must be construed according to the laws of England.— *Trotter v. Trotter* - - - - - p. 502

A will by which the testator recites that "he considers it "his duty while in health to execute a settlement of "all his estate and effects," appointing executors in England and in India, and directing that the residue of his estate in India should be remitted to his executors in Scotland, and that they should divide that residue and the *whole* of his *property* in Europe equally between his brothers and sisters. Held *not* to pass

wise than by a pardon from the crown.—
Mackay

THE END.

